Petition

81-1335

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, *et al.*,

Petitioners,

—v.—

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 13, 1982

QUESTION PRESENTED FOR REVIEW

Whether the federal courts in the District of Columbia have jurisdiction to review orders of the District of Columbia Court of Appeals with respect to admission to the D.C. Bar, in view of an Act of Congress expressly transferring jurisdiction over admission to the D.C. Bar from the federal courts to the District of Columbia Court of Appeals and in light of fundamental considerations of comity and federalism.

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This petition seeks review of a decision of the U.S. Court of Appeals for the D.C. Circuit which disposed of two appeals in that Court. The parties to the two appeals were:

1. *Feldman* v. *Gardner* [D.C. Cir. No. 78-2235]

Plaintiff

Marc Feldman

Defendants

William C. Gardner
Chairman, Committee on Admissions
District of Columbia Court of Appeals

Anthony Nigro
Secretary, Committee on Admissions
District of Columbia Court of Appeals

Committee on Admissions
District of Columbia Court of Appeals

District of Columbia Court of Appeals

The Honorable Theodore R. Newman, Jr.,
Chief Judge, District of Columbia
Court of Appeals

2. *Hickey* v. *District of Columbia Court of Appeals* [D.C. Cir. No. 79-1233]

Plaintiff

Edward J. Hickey, Jr.

Defendants

District of Columbia Court of Appeals

The Honorable Judges of the District of Columbia Court of Appeals:

Theodore R. Newman, Jr., Chief Judge
Catherine B. Kelly
John W. Kern, III
George R. Gallagher
Frank Q. Nebeker
Walter Yeagley
Stanley S. Harris
Julia C. Mack
John M. Ferren

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The split decision of the U.S. Court of Appeals of which review is sought is not yet reported. That opinion decided two separate appeals from decisions of Judges of the U.S. District Court for the District of Columbia dismissing complaints for lack of subject-matter jurisdiction: (i) an appeal from the unreported decision of Judge June L. Green in *Feldman* v. *Gardner* (D.D.C.) (Memorandum Opinion filed October 24, 1978); and (ii) an appeal from the unreported decision of Judge Harold H. Greene in *Hickey* v. *District of Columbia Court of Appeals* (D.D.C.) (Memorandum Order filed December 21,

1978).[1] The two appeals were not formally consolidated in the U.S. Court of Appeals, but the Court heard argument in both cases on the same day and decided the cases together.

The two decisions of the District of Columbia Court of Appeals involved in this matter are also not reported. Along with all the above decisions, they are included in the Appendix to this petition, which is being presented in a separate volume.

STATEMENT OF JURISDICTION

The panel of the U.S. Court of Appeals filed its opinion on July 23, 1981. The majority opinion was written by Chief Judge Robinson, with the concurrence of Judge Davis of the U.S. Court of Claims, sitting by designation. Judge Robb dissented on the issue of jurisdiction raised in this petition.

The U.S. Court of Appeals denied petitions for rehearing and suggestions for rehearing *en banc* on October 27, 1981. Two judges recused themselves with respect to the petitions and suggestions. Of the remaining judges, three (Robb, MacKinnon, and Ginsburg, JJ.) voted for rehearing on the jurisdictional issue, with the result that the *en banc* rehearing was denied by a vote of 5 to 3.

This petition is filed within 90 days of the U.S. Court of Appeals' denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

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1 Although Judge Greene's final decision is not reported, his decision denying interlocutory relief in the matter is reported. *Hickey* v. *District of Columbia Court of Appeals*, 457 F. Supp. 584 (D.D.C. 1978). The decision of the U.S. Court of Appeals for the District of Columbia Circuit dismissing an appeal from Judge Greene's decision on interlocutory relief is not reported. Order of July 24, 1978, No. 79-1233.

STATUTES INVOLVED

The principal statutes involved in this case are 11 D.C. Code §§ 102 and 2501(a). These are provisions of the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (1970), which reorganized the court system in the District of Columbia. They provide as follows:

> "The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code." 11 D.C. Code § 102.
>
> "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." 11 D.C. Code § 2501(a).

The case also involves Rule 46I(b) (3) of the General Rules of the D.C. Court of Appeals, which provides:

> "An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school."

STATEMENT OF THE CASE

The decision of the U.S. Court of Appeals involved two suits presenting the same jurisdictional issue on somewhat different facts. The facts of each case, therefore, are separately stated below.

A. Respondent Feldman's Case

Respondent Feldman did not attend law school but read law instead, as permitted in Virginia. He was admitted to the Virginia Bar in April 1976.

In November 1976, he submitted an application to the Committee on Admissions of the D.C. Court of Appeals seeking admission to the D.C. Bar without examination. The Committee notified him that it could not admit him because he had not graduated from a law school approved by the American Bar Association, as required by Rule 46I(b) (3) of the General Rules of the D.C. Court of Appeals.[2] The Committee advised Mr. Feldman that the authority to grant waivers of the Rules rested solely with the Court.

Thereafter, in June 1977, he filed a petition with the D.C. Court of Appeals seeking the same relief. In his petition, Mr. Feldman acknowledged that he did not comply with the Court's Rule, but alleged that his "professional education and training is equal to that received by those who have attended an ABA-approved law school." (Petition of Marc Feldman for Admission to the Bar of the District of Columbia Without Examination, June 13, 1977, p. 5.)

His counsel later submitted a lengthy letter on his behalf to the D.C. Court of Appeals. The letter was in the nature of a

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2 Thirty-three states have similar rules. The validity of such rules has uniformly been upheld. *See, e.g., Application of Hansen*, 275 N.W.2d 790 (Minn. 1978), *appeal dismissed for want of a substantial federal question*, 441 U.S. 938 (1979).

brief, and argued that "barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions under the United States Constitution and the federal antitrust laws." (Letter of March 6, 1978, p. 1.) Mr. Feldman's counsel cited various decisions purporting to support this challenge to the D.C. Court of Appeals' Rule, and contended that "it is clear that a bar admissions procedure that requires graduation from an ABA-accredited law school cannot stand." (*Id.*, p. 7.)

On March 30, 1978, after considering Mr. Feldman's petition and the submission by his counsel, the D.C. Court of Appeals, acting *en banc*, issued a *per curiam* order denying the petition. A letter signed by Chief Judge Theodore R. Newman, Jr., was sent on behalf of the Court to Mr. Feldman's counsel and explained the basis for the Court's order. The letter said:

> "Pursuant to the usual practice of this Court, Mr. Feldman's petition was referred to the Committee on Admissions for its review. The Committee recognizes that Mr. Feldman's record indicates he has had an exceptional opportunity for training and is a personable, impressive, and outstanding individual. However, the purpose of the rule, which requires graduation from a law school approved by the American Bar Association or 24 hours of study after graduation from a non-approved law school to be eligible to sit for the bar examination, is to prevent the Committee and the Court from assuming the practicably impossible task of making separate subjective evaluations of each applicant's training and education; hence, an objective and reasonable standard as prescribed by the rule must be utilized.
>
> "The Committee unanimously has recommended that the petition of Mr. Feldman be denied, and the Court has concluded that its rules should not be waived. Mr. Feldman, of course, will be eligible to make an application for admission to the bar after he has completed five years of practice." (Letter of March 29, 1978 from the Honorable Theodore R. Newman, Jr., to Robert M. Sussman, Esq.)

Although decisions of the D.C. Court of Appeals are reviewable in this Court under 11 D.C. Code § 102, *supra*, Mr. Feldman did not seek review here. Instead, two months later, he commenced an action in the U.S. District Court for the District of Columbia and named the D.C. Court of Appeals and its Committee on Admissions as defendants.

His complaint alleged that the local court "has refused to exercise its plenary power over the licensing of attorneys to waive [its] rules on plaintiff's behalf." (Complaint ¶ 1.) The complaint set forth the particular facts of Mr. Feldman's case and had attached to it as exhibits his petition in the D.C. Court of Appeals and his counsel's submission to that Court. The complaint restated the constitutional and antitrust theories previously argued by Mr. Feldman's attorney in his letter to the D.C. Court of Appeals, and stressed that the same issues had been raised before the D.C. Court of Appeals. In the proceedings before the local court, the complaint said, Mr. Feldman's counsel had:

> "argued that, on its face and as applied, Rule 46 violated both the United States Constitution and the federal antitrust laws insofar as it conclusively denied admission to the bar to all persons except graduates of an ABA accredited law school." (Complaint ¶ 24.)

The complaint requested a declaratory judgment and an injunction against the D.C. Court of Appeals, requiring the local court to (a) admit Mr. Feldman to its Bar without examination, or (b) permit him to sit for the D.C. bar examination, or (c) make an *ad hoc* determination whether his qualifications were equivalent to those of applicants who had met the Court's prescribed educational standards and, if so, admit him to the D.C. Bar or the bar examination.

The D.C. Court of Appeals, and the other defendants, moved to dismiss the complaint on the ground that the District Court lacked jurisdiction to review the decision of the D.C. Court of Appeals in Mr. Feldman's case and, alternatively, on

the ground that his claims—having already been presented to and rejected by the D.C. Court of Appeals—were barred by *res judicata.*

In October 1978, the District Court dismissed the complaint for lack of subject-matter jurisdiction, without reaching the question of *res judicata.* On Mr. Feldman's appeal of that dismissal, the panel of the U.S. Court of Appeals rendered the decision at issue here, and held that there was original subject-matter jurisdiction in the federal courts over his constitutional claims. The Court held that such jurisdiction was lacking over his antitrust claims because of their insubstantiality.

B. Respondent Hickey's Case

Respondent Hickey graduated from the Potomac School of Law in Washington, D.C., in the summer of 1978. Potomac was organized and enrolled its first class in 1975. It has never been approved by the American Bar Association. The school is presently involved in proceedings under Chapter 11 of the bankruptcy laws. *In re Potomac School of Law* (D.D.C. No. 81-00307) (petition filed June 5, 1981).

In April 1978, prior to his graduation, Mr. Hickey submitted a Special Petition to the D.C. Court of Appeals, requesting that the Court waive, in his case, its Rule requiring graduation from an ABA-approved law school as a prerequisite to sitting for the D.C. bar examination. He was represented by counsel and argued—as Mr. Feldman had—that he was qualified to sit for the examination notwithstanding the fact that he did not qualify under the Court's rules. His petition stressed his "unique background" and recited his individual qualifications in detail. (In the Matter of Edward J. Hickey, Jr., Special Petition for a Waiver of District of Columbia Court of Appeals Rule 46I(b) (3), April 18, 1978, pp. 2-3.)

On June 12, 1978, the D.C. Court of Appeals, acting *en banc,* entered an order denying the Hickey petition. The Court noted that its Rules would allow Mr. Hickey to take the D.C.

bar examination if he completed 24 semester hours in an ABA-approved law school.

After the denial of his petition by the D.C. Court of Appeals, Mr. Hickey—again like Mr. Feldman—took his case to the U.S. District Court rather than seeking review in this Court. On July 10, 1978, he filed a complaint for a declaratory judgment and for injunctive relief against the D.C. Court of Appeals and the individual Judges of that Court. He alleged that the Rule respecting graduation from an ABA-approved law school was, at least as applied to him, unconstitutional and violative of the federal antitrust laws. (Complaint ¶ 11.)

Upon filing his complaint, Mr. Hickey moved immediately for interlocutory relief requiring the local court to admit him to the July 1978 D.C. bar examination. The District Court, however, denied his request for interlocutory relief, *Hickey* v. *District of Columbia Court of Appeals,* 457 F. Supp. 584 (D.D.C. 1978), and the U.S. Court of Appeals dismissed his appeal of the denial. *Hickey* v. *District of Columbia Court of Appeals,* (D.C. Cir. No. 79-1233) (July 24, 1978).

The D.C. Court of Appeals and its Judges thereafter moved to dismiss the Hickey complaint for lack of subject-matter jurisdiction. In the interim period prior to the District Court's ruling on the motion, Mr. Hickey's counsel attempted an extensive program of discovery from the D.C. Court of Appeals, seeking to probe the local court's decision-making processes in bar admission matters. With respect to the denial of Mr. Hickey's petition, his counsel asked, *inter alia,* for "a detailed description of the considerations on which this denial was based" and for "the identity of all those who participated in each discussion and the position taken by each participant in each discussion." (Plaintiff's Interrogatory No. 8.)

In December 1978, the District Court dismissed the Hickey complaint for lack of subject-matter jurisdiction. Mr. Hickey appealed, and his appeal was considered by the U.S. Court of Appeals at the same time as the appeal in the *Feldman* case.

The U.S. Court of Appeals panel reached the same results as it had in the *Feldman* case.

C. The U.S. Court of Appeals' Decision

The U.S. Court of Appeals' split decision held, contrary to the prior holdings of both District Judges, that the federal District Court in the District of Columbia has jurisdiction to review the decisions of the D.C. Court of Appeals in bar admissions matters. Accordingly, the U.S. Court of Appeals remanded both cases for further proceedings on the merits of plaintiffs' constitutional claims.[3]

It is Petitioners' position that the dissenting Judge in the U.S. Court of Appeals and the two District Court Judges all were correct in concluding that there was no basis for original federal subject-matter jurisdiction over either case.

REASONS FOR ALLOWING THE WRIT

The D.C. Court of Appeals, by Act of Congress, is the highest court of the District of Columbia. The decisions of the D.C. Court of Appeals, like the decisions of state Supreme Courts, are reviewable in this Court but nowhere else. 11 D.C. Code § 102. Congress has also given the D.C. Court of Appeals exclusive jurisdiction over "examination, qualification, and admission" to the D.C. Bar. D.C. Code § 11-2501.

In the two cases here at issue, the panel of the U.S. Court of Appeals for the D.C. Circuit has held that decisions of the D.C. Court of Appeals respecting bar admission may be

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3 Although the U.S. Court of Appeals panel split two-to-one on the jurisdictional issue, the panel was unanimous in holding that the antitrust claims were clearly without merit and in affirming the District Courts' dismissal of those claims. The holding as to the antitrust claims was correct, and no review of that decision is sought in this petition.

reviewed by the federal District Courts in the District of Columbia. The basic premise of the panel's holding is that bar admission decisions are not judicial in character and, therefore, are subject to review by a federal District Court despite the statutory procedure established by Congress for review in this Court of decisions of the D.C. Court of Appeals.

This conclusion conflicts with the decisions of this Court on the point and with the decisions of numerous other U.S. Courts of Appeals that have considered the issue of federal-court jurisdiction over state bar admission decisions. It also conflicts with the 1970 statute, the Court Reform and Criminal Procedure Act, by which Congress withdrew jurisdiction over the D.C. Bar from the federal courts in the District and expressly transferred that jurisdiction to the D.C. Court of Appeals. And the conclusion violates fundamental principles of comity and federalism between dual court systems, which now apply perhaps even more strongly in the District of Columbia than they do in the 50 states.

The practical effect of the U.S. Court of Appeals' panel decision is to recapture for the federal courts in the District of Columbia the jurisdiction over Bar matters that Congress explicitly transferred, a decade ago, to the D.C. Court of Appeals. The panel has simply refused to accept the Congressional allocation of jurisdiction. Regrettably, this is not the first time that the U.S. Court of Appeals for the D.C. Circuit has sought to cling to jurisdiction and power over the courts and citizens of the District of Columbia of which Congress has divested it. *Cf. Swain* v. *Pressley,* 430 U.S. 372 (1977).

Certiorari is clearly warranted to correct the decision below and uphold the Congressional mandate.

I.

The U.S. Court of Appeals' Decision Conflicts with Applicable Decisions of this Court

In support of its conclusion that federal courts in the District of Columbia can review the decisions of the D.C. Court of Appeals in bar admissions matters, the panel majority held that in both the *Hickey* and *Feldman* cases "the prior proceedings before the [D.C.] Court of Appeals were of a nonjudicial character, and therefore did not produce in either a judgment reviewable by the Supreme Court." (App. at 49a.) Therefore, according to the majority, the D.C. Court of Appeals' decisions in both cases were reviewable in the District Court.

The holding of the panel majority that bar admissions proceedings are non-judicial in character cannot be squared with decisions in this Court on the subject going back more than a century. This Court rejected that line of reasoning as early as 1866 when it noted that attorneys are officers of the court and held that "[t]heir admission or their exclusion *is not the exercise of a mere ministerial power. It is the exercise of judicial power,* and has been so held in numerous cases." *Ex parte Garland.* 71 U.S. 333, 378-79 (1866) (emphasis supplied).

More recently, in a leading decision on the subject, this Court reaffirmed that orders of state courts respecting bar admission matters are judicial and are reviewable, like other judicial orders, in this Court:

> "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in the state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court." *In re Summers,* 325 U.S. 561, 568-69 (1945).

The only difference between *Summers*, on the one hand, and the *Feldman* and *Hickey* cases, on the other, is that the plaintiffs in *Feldman* and *Hickey* sought entry to the bar examination rather than direct admission to the bar.[4] As the dissent in the U.S. Court of Appeals correctly noted:

> "I can see no difference in principle, so far as review in the Supreme Court is concerned, between denial of a claim of present right to admission to the bar, on the one hand, and denial of a claim that the appellants are presently qualified to take the bar examination." (App. at 55a.)

Since *Summers*, this Court has consistently and repeatedly reaffirmed the judicial nature of bar-related decisions of state courts by reviewing them on certiorari. *See, e.g., Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) (certiorari to the Supreme Court of New Mexico); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957) (certiorari to the Supreme Court of California); *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961) (certiorari to the Supreme Court of California); *In re Anastaplo*, 366 U.S. 82 (1961) (certiorari to the Supreme Court of Illinois); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) (certiorari to the Court of Appeals of New York); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971) (certiorari to the Supreme Court of Arizona); *In re Stolar*, 401 U.S. 23 (1971) (certiorari to the Supreme Court of Ohio).

Thus, both Mr. Feldman and Mr. Hickey could have sought review in this Court of the adverse decisions of the D.C. Court of Appeals on their petitions, but they failed to do so. They should not now be allowed to bypass the Congressionally determined method of review and obtain such review in the lower federal courts.

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4 Mr. Feldman sought either direct admission to the D.C. Bar or entry to the bar examination.

II.

The U.S. Court of Appeals' Decision Conflicts with the Decision of Other Courts of Appeals on the Same Issue

The decision here at issue also conflicts with the decisions of numerous other U.S. Courts of Appeals that have considered the question of federal-court jurisdiction over bar matters. Other federal Courts of Appeals have repeatedly held—consistently with *In re Summers, supra,* and this Court's other decisions—that *"orders of a state court relating to the admission,* discipline, and disbarment *of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court." MacKay* v. *Nesbett,* 412 F.2d 846 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969) (emphasis supplied); *accord, Brown* v. *Board of Bar Examiners,* 623 F.2d 605 (9th Cir. 1980).

This conclusion has been reached not only in the Ninth Circuit, but also in the First Circuit, *Diaz-Buxo* v. *Trias Monge,* 593 F.2d 153 (1st Cir.), *cert. denied,* 444 U.S. 833 (1979); *Martinez Rivera* v. *Trias Monge,* 587 F.2d 539 (1st Cir. 1978); the Fourth Circuit, *Woodard* v. *Virginia Board of Bar Examiners,* 598 F.2d 1345 (4th Cir. 1979); the Sixth Circuit, *Whitwell* v. *Board of Law Examiners,* 652 F.2d 60 (6th Cir.), *cert. denied,* 50 U.S.L.W. 3246 (1981); *Ginger* v. *Circuit Court for the County of Wayne,* 372 F.2d 621 (6th Cir.), *cert. denied,* 387 U.S. 935 (1967); the Seventh Circuit, *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122 (7th Cir. 1977); the Eighth Circuit, *Jones* v. *Hulse,* 391 F.2d 198 (8th Cir.), *cert. denied,* 393 U.S. 889 (1968); and the Tenth Circuit, *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977); *Gately* v. *Sutton,* 310 F.2d 10[illegible] (10th Cir. 1962).

Decisions in two U.S. Courts of Appeals arguably run counter to this strong line of authority. *Dasher* v. *Supreme*

Court of Texas, 658 F.2d 1045 (5th Cir. 1981); *Ktsanes* v. *Underwood,* 552 F.2d 740 (7th Cir. 1977), *cert. denied,* 435 U.S. 938 (1978).[5] This divergence of views among the Circuits—as well as in the D.C. Circuit itself—underscores the appropriateness of a grant of certiorari to resolve the issue.

III.

The U.S. Court of Appeals' Decision Conflicts with the District of Columbia Court Reorganization Act

When Congress reorganized the court system in the District of Columbia in 1970, it deliberately withdrew jurisdiction over the D.C. Bar from the federal courts in the District, which had previously regulated the D.C. Bar, and transferred that jurisdiction to the D.C. Court of Appeals. Congress conferred express and exclusive jurisdiction on the D.C. Court of Appeals over "examination, qualification, and admission" to the D.C. Bar. 11 D.C. Code § 2501. And it made the decisions of the D.C. Court of Appeals, like the decisions of state Supreme Courts, reviewable in this Court. 11 D.C. Code § 102.

The plaintiffs in these two cases, after unsuccessful efforts before the D.C. Court of Appeals, ignored the statutory system for review and took their claims for bar admission to the federal courts in the District. The dissenting Judge in the U.S. Court of Appeals, as well as both District Judges who considered the issue, recognized that allowing such a procedure would effectively subvert a Congressional decision of exceptional clarity respecting jurisdiction over the D.C. Bar. Thus, Judge Robb in the U.S. Court of Appeals observed:

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5 Even these decisions, however, are problematic. The *Dasher* decision in the Fifth Circuit was issued only as a result of a petition for rehearing by the panel. The panel's original decision reached an entirely different conclusion and was in line with the holdings in other circuits. *See Dasher* v. *Supreme Court of Texas,* 650 F.2d 711 (5th Cir. 1981). The *Ktsanes* decision in the Seventh Circuit reached an opposite result from the decision of the same Court, in the same year, in *Grossgold.*

> "The decision of the majority sanctions an intrusion by the federal courts into what Congress plainly intended to be the prerogative of the District of Columbia court. I think this is unfortunate. It is especially unfortunate in cases such as these in which candidates for admission to the bar are challenging the judgment of the District of Columbia Court of Appeals that they are not qualified to take the bar examination. In my opinion that kind of controversy should not be the business of the United States District Court." (App. at 56a.)

Judge June L. Green in the District Court likewise stated in *Feldman:*

> "If this Court were to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court. Congress explicitly denied such a position to this Court when it enacted the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970) and exclusively empowered the D.C. Court of Appeals with authority to prescribe rules for admission to the D.C. bar." (App. at 65a-66a.)

And Judge Harold H. Greene, also in the U.S. District Court, said in *Hickey:*

> "The D.C. Court of Appeals is the highest court of the District of Columbia, and its status is that of a state supreme court. Any order directed to it or its judges would be a serious intrusion into areas which not only are intrinsically matters of local judicial jurisdiction and concern, but which were deliberately transferred from this Court to defendants' control by the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970)." 457 F. Supp. at 586.

The panel majority's decision in the U.S. Court of Appeals overrides Congress' choice. It not only intrudes on the prerog-

atives of the D.C. Court of Appeals but confers again on the federal courts in the District of Columbia the very jurisdiction that Congress so clearly withdrew in 1970. The decision means that, notwithstanding Congress' mandate to the contrary, the local courts in the District must once again be subservient to the federal courts.

IV.

The U.S. Court of Appeals' Decision Violates Fundamental Principles of Comity and Federalism

Bar admission and regulation have always been recognized as matters of peculiarly local concern. As this Court has emphasized:

> "Since the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979).

Federal-court interference in such matters is not only inappropriate but also unnecessary. The Judges of the D.C. Court of Appeals, like the Judges of state Supreme Courts, are bound to uphold and apply the Constitution and laws of the United States just as federal Judges are. *See, e.g., Harper* v. *District of Columbia Committee on Admissions*, 375 A.2d 25 (D.C. 1977). This Court has expressly rejected "the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Yet the panel majority's decision in substance reinstates that assumption as to the Judges of the D.C. Court of Appeals.

Permitting review of the decisions of the D.C. Court of Appeals by a federal court of limited jurisdiction compromises the authority of the highest Court of the District of Columbia

and undermines the division of responsibility that a federal system requires and that Congress adopted for the District of Columbia. The decision below, if permitted to stand, will encourage disappointed bar applicants to invoke the jurisdiction of the District Court, with the result that substantial control over admission to the bar will be exercised by that court and not the court to which Congress entrusted such responsibility.

The rule against federal jurisdiction in local bar matters is not arbitrary. It rests upon fundamental principles of comity and on the mutual respect that must exist between local and federal courts in a federal system.[6] As the U.S. Court of Appeals for the Ninth Circuit observed in *MacKay* v. *Nesbett*, *supra:*

> "The rule serves substantial policy interests arising from the historic relationship between the state judicial systems and the members of their respective bars, and between the state and federal judicial systems. We are persuaded that it is sound." 412 F.2d at 846.

Even the panel majority in the D.C. Circuit recognized that the D.C. Court of Appeals "has the same compelling interest as a state supreme court in regulating the bar of its jurisdiction." (App. at 25a.) Yet the decision here pays no more than lip service to that compelling interest. The decision below not only sanctions federal interference in matters of purely local concern, but does so in the face of a statute that expressly removes such matters from the purview of the federal courts.

The principles of comity and federalism which support the federal courts' traditional refusal to become entangled in local

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6 This Court has always been sensitive to such concerns. *See, e.g., Younger* v. *Harris*, 401 U.S. 37 (1971). In *Garden State Bar Ass'n* v. *Middlesex County Ethics Committee*, 651 F.2d 154 (3d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3351 (November 3, 1981), the Court recently agreed to review a not dissimilar question of federal-court jurisdiction over a state bar matter.

bar admissions matters apply with special force in the District of Columbia, where the allocation of judicial responsibility has been established by Congress itself. The decision below flouts those principles.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rules 19.3 and 28.5 of the Rules of the United States Supreme Court, I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were sent by first-class mail, postage prepaid, to each of the following counsel for the parties to the proceedings in the Court of Appeals, on this 13th day of January, 1982:

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Appendix

81-1335

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, *et al.*,

Petitioners,

—v.—

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 13, 1982

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2235

MARC FELDMAN, APPELLANT

v.

WILLIAM C. GARDNER, *et al.*

No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Actions Nos. 78-0957, 78-1276)

Argued September 21, 1979

Decided July 23, 1981

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert M. Sussman, with whom *James A. Touplin* was on the brief, for appellant Marc Feldman.

Michael F. Henly, with whom *Fred F. Fielding* and *Ingrid M. Olson* were on the brief, for appellant Edward J. Hickey, Jr.

Daniel A. Rezneck, with whom *Abe Krash* and *Charles H. Cochran* were on the brief, for appellees.

Before ROBINSON, *Chief Judge*, ROBB, *Circuit Judge*, and DAVIS, *Judge*.*

Opinion for the Court filed by *Chief Judge* ROBINSON.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* ROBB.

ROBINSON, *Chief Judge*: These cases mark the continuing efforts of two lawyers to surmount the single legal barrier to practice of their chosen profession in the District of Columbia. The obstacle they face is posed by Rule 46I(b) of the District of Columbia Court of Appeals, which specifies that only graduates of law schools accredited by the American Bar Association (ABA), and graduates of other law schools who have taken supplementary courses at an ABA-approved institution, may sit for the District of Columbia bar examination.[1]

Appellants, Edward J. Hickey and Marc Feldman, when intercepted by this proscription, petitioned the District of Columbia Court of Appeals[2] to waive it in their behalf.

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* Of the United States Court of Claims, sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

[1] Rule 46I(b) is quoted, in relevant part, in text *infra* at note 7. See note 182 *infra*.

[2] Hereinafter the District of Columbia Court of Appeals frequently will be referred to simply as "the Court of Appeals." The term "District Court" signifies the United States District Court for the District of Columbia.

When the court declined to do so, they brought separate actions in the District Court assailing the validity of Rule 46I(b) under the Constitution and the federal antitrust laws. In each instance the District Court dismissed the constitutional counts, as well as Feldman's antitrust attack, on the ground that it lacked jurisdiction to entertain them, reasoning that the Court of Appeals' rulings on the applications for waivers were judicial in nature, and as such were reviewable only in the Supreme Court of the United States. Hickey's antitrust suit was dismissed as frivolous.

Careful review of the antitrust arguments advanced by appellants satisfies us that they are insubstantial, and we affirm their dismissal on this basis. Intensive study of the jurisdictional problem, however, constrains us to conclude that the waiver proceedings were not judicial in the federal sense, and thus did not foreclose litigation of the constitutional contentions in the District Court. We accordingly reverse the dismissals of the constitutional claims and remand them for consideration on the merits.[3]

I. Background of the Litigation

Prior to the last decade, the District Court supervised admission to the District of Columbia bar.[4] In 1970,

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[3] Although these cases have not been consolidated, see Fed. R. App. P. 3(b), they raise nearly identical legal issues and were argued sequentially on the same day. Consequently, we deal with them in a single opinion. Appellees in No. 79-1233 are the District of Columbia Court of Appeals as an entity and the judges of that court in their official capacities. Appellees in No. 78-2235 are the chairman and the secretary of the Committee on Admissions of the District of Columbia Bar, the Committee itself, and the judges of the Court of Appeals, each of whom is sued in his or her official capacity. See note 61 *infra*.

[4] See Act of Apr. 19, 1920, ch. 153, 41 Stat. 561 (1920); *Austin* v. *Municipal Court*, 98 U.S.App.D.C. 339, 340, 235

Congress enacted the District of Columbia Court Reform and Criminal Procedure Act,[5] by which that function was transferred to the District of Columbia Court of Appeals, together with authority to promulgate regulations governing bar membership.[6] The Court of Appeals subsequently adopted, as part of its general rules, the challenged provision limiting entry to the bar. This contested directive is embodied in Rule 46I(b), which in pertinent part provides:

> (3) *Proof of Legal Education.* An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee [on Admissions] a certificate verifying that he has graduated from an approved law school.
>
> (4) *Law Study in a Law School NOT Approved by the ABA.* An applicant who graduated from a law school not approved by the American Bar Association may be permitted admission to an examination only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval.[7]

F.2d 836, 837 (1956), *cert. denied*, 353 U.S. 923, 77 S.Ct. 682, 1 L.Ed.2d 720 (1957); *Brooks* v. *Laws*, 92 U.S.App.D.C. 367, 371, 208 F.2d 18, 22 (1953).

[5] Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 473, codified in relevant part at D.C. Code § 11-2501 (1973).

[6] *Id.* § 111, 84 Stat. 521 (1970), codified in relevant part at D.C. Code § 11-2501 (1973).

[7] D.C. App. R. 46I(b) (1978). We are told that 33 states in addition to the District of Columbia limit admission to the bar in a similar fashion. Brief for Appellees in No. 78-2235 at 5; Brief for Appellees in No. 79-1233 at 6.

This rule blocks both appellants, as presently circumstanced, from essaying to pass the District of Columbia bar examination.[8]

A. *Appellant Hickey*

Following a career in the United States Navy, Hickey entered the Potomac School of Law in March, 1975.[9] He was aware that Potomac was not then accredited by ABA,[10] but hoped subsequently to transfer to an approved law school.[11] Shortly after he matriculated, however, the Court of Appeals waived Rule 46I(b)(3)[12] in favor of the 1975 graduates of the International School of Law—another recently established, unaccredited institution—in order to permit them to sit for the bar examination without completing any additional courses.[13] Similar dispensations were later accorded to International's 1976 and 1977 graduating classes.[14]

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[8] It seems, however, that after five years of law practice elsewhere, each appellant may apply for admission to the District of Columbia bar without examination. See note 51 *infra* and accompanying text.

[9] Complaint, *Hickey* v. *District of Columbia Court of Appeals*, Civ. No. 78-1276 (D.D.C., filed July 10, 1978) ¶ 4 [hereinafter cited as Hickey Complaint], Joint Appendix in No. 79-1233 at 8 [hereinafter cited as H. App.]. Because Hickey's case is before us on appeal from the grant of a motion to dismiss, we take as true all well-pleaded allegations of the complaint, bearing in mind that a "complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

[10] Hickey Complaint, *supra* note 9, ¶ 6, H. App. 9.

[11] *Id.*, H. App. 9.

[12] Quoted in text *supra* at note 7.

[13] Hickey Complaint, *supra* note 9, ¶ 6, H. App. 9.

[14] *Id.*

In light of the indulgence thus extended to International's alumni, Hickey anticipated that upon completion of his studies at Potomac he too would be allowed to take the bar examination.[15] Contrary to his expectations, however, the Court of Appeals, in November of 1977, denied Potomac's petition for a temporary waiver of the rule on behalf of its graduates. Although students who had been graduated from International prior to August, 1977, would be permitted to sit for the bar examination, the court announced its resolve to discontinue exemptions.[16]

On April 18, 1978, Hickey, through his counsel, filed a petition in the Court of Appeals seeking personal exception from the rule.[17] Hickey set forth his academic achievements [18] and attached affidavits from members of the District of Columbia bar attesting to his competence.[19] He urged that application of the newly-stated nonwaiver policy against him would be unfair, explaining that he had not anticipated it and that its enforcement would work particular hardship because he was then unemployed and the sole support of his wife and children.[20] Hickey's petition also alleged, on information and belief, that ABA policies precluded him from gaining admission to an accredited law school in order to qualify under the provisions of Rule 46I(b)(4).[21] On June 12, 1978, the

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[15] *Id.* ¶ 7, H. App. 9.

[16] *Id.*

[17] Special Petition for a Waiver of District of Columbia Court of Appeals Rule 46I(b)(3) [hereinafter cited as Hickey Petition], H. App. 16.

[18] *Id.* at 1-2, H. App. 17-18. See also *id.* Exhibit (Ex.) A (law school transcript), H. App. 24.

[19] *Id.* Exs. B-E, H. App. 25-33.

[20] *Id.* at 3-6, H. App. 19-22.

[21] *Id.* at 6, H. App. 22. Rule 46I(b) is quoted in text *supra* at note 7.

Court of Appeals denied Hickey's petition in what was styled as a per curiam order.[22] The court stated that ABA standards "permit enrollment of persons in petitioner's category" [23] in accredited law schools, but did not respond to any of the other grounds advanced by Hickey in support of his waiver request.

Hickey then brought his action in the District Court. There he alleged that the Court of Appeals acted arbitrarily and capriciously in refusing him a waiver; [24] that Rule 46I(b) contravenes both the equal protection and due process components of the Fifth Amendment; [25] and that appellees have unreasonably restricted entry into the legal profession, united in a combination in restraint of trade, attempted to monopolize and actually monopolized the practice of law in the District of Columbia, in violation of Sections 1 and 2 of the Sherman Act [26] and caused appellants to sustain injury to business or property within the meaning of Section 4 of the Clayton Act.[27] An affidavit accompanying the complaint avowed that every ABA-accredited law school in the District of Columbia had been contacted, and that each denied admission to individuals in his situation as a matter of

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[22] Hickey Complaint, *supra* note 9, Ex. B, H. App. 35.

[23] *Id.*

[24] *Id.* ¶ 11, H. App. 11-12. Although Hickey raised this point before the District Court, he has not pursued it on appeal; indeed his brief repeatedly characterizes his suit as a challenge to the validity of Rule 46I. See, *e.g.*, Brief for Appellant Hickey at 24. See also note 200 *infra*.

[25] *Id.* ¶ 11 & prayer for relief, H. App. 11-12, 13-14.

[26] *Id.* ¶¶ 13, 14, H. App. 13. See Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976). Section 3 of the Sherman Act applies the antitrust laws in the District of Columbia. 15 U.S.C. § 3 (1976).

[27] *Id.* ¶ 15, H. App. 13. See Clayton Act, § 4, 15 U.S.C. § 15 (1976).

policy, thus making it impossible for him to comply with Rule 46I(b).[28]

The District Court dismissed the complaint for an asserted lack of jurisdiction.[29] The court held that the Court of Appeals' disposition of Hickey's waiver petition was judicial in character and therefore reviewable only in the Supreme Court.[30] The court further ruled that the antitrust laws did not apply to the type of action under attack.[31] Hickey's appeal followed.

B. *Appellant Feldman*

Feldman looked forward to a legal career upon graduation from college, but chose to read for the Virginia bar [32]

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[28] *Id.* Ex. C, H. App. 41-44.

[29] *Hickey* v. *District of Columbia Court of Appeals*, Civ. No. 78-1276 (D.D.C. Dec. 21, 1978) (memorandum order) at 3 [hereinafter cited as *Hickey Order*], H. App. 143. Early on, the court had denied Hickey's motion for a preliminary injunction mandating his admission to the July, 1978, bar examination. *Hickey* v. *District of Columbia Court of Appeals*, 457 F.2d 584 (D.D.C. 1978). Hickey appealed that ruling, but this court refused an injunction pending appeal and dismissed the appeal *sua sponte*. *Hickey* v. *District of Columbia Court of Appeals*, No. 79-1233 (D.C. Cir. July 24, 1978) (order).

[30] *Id.* at 2, H. App. 142.

[31] *Id.* at 3, H. App. 143.

[32] Va. Code § 54-62 (1978 rev.) provides:

> Preliminary proof of education required of applicant—In addition to the certificate required by §§ 54-60 and 54-61, every applicant before taking any examination under this article shall furnish to the Board satisfactory evidence that such applicant has:
>
> (1) Received a degree or certificate from a law school approved by the American Bar Association, or the Board, or,
>
> (2) (i) Completed at least a three-year academic course of an accredited college and (ii) studied law for at least

rather than attend law school.[33] Under the supervision of the state's Board of Bar Examiners, he began his training with a Charlottesville law firm in October, 1972. In the course of his studies, Feldman formally audited approximately 18 credit hours of classes at the University of Virginia Law School, and he spent the final six months of his apprenticeship as a law clerk to a district judge in this circuit.[34]

Feldman sat for the Virginia bar examination in February, 1976, and was admitted to the Virginia bar in April of that year.[35] From March 1, 1976, until January 1, 1977, he worked as a staff attorney with a legal aid bureau in Baltimore.[36] Maryland, like the District of Columbia, has a rule limiting the bar examination to graduates of ABA-approved institutions,[37] but the state's Board of Law Examiners waived the rule on Feldman's behalf.[38] He subsequently passed the Maryland examination and was admitted to the bar of that state.[39]

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three years, in the office of an attorney practicing in this State, whose full time is devoted to the practice of law, or studied law for at least three years partly in a law school approved by the American Bar Association or the Board and partly in said practicing attorney's office. The attorney in whose office the applicant intends to study shall be approved by the Board which shall prescribe reasonable conditions as to such course of study.

[33] Complaint, *Feldman* v. *Gardner*, Civ. No. 78-0957 (D.D.C., filed May 26, 1978) ¶ 9 [hereinafter cited as Feldman Complaint], Joint Appendix in No. 78-2235 at 6 [hereinafter cited as F. App.]. As in Hickey's case, we take as true the facts well-pleaded in Feldman's complaint. See note 9 *supra*.

[34] *Id.* ¶¶ 10, 12-14, F. App. 6-7.

[35] *Id.* ¶ 15, F. App. 7.

[36] *Id.* ¶ 16, F. App. 7.

[37] *Id.* ¶ 17, F. App. 8.

[38] *Id.*

[39] *Id.* ¶ 18, F. App. 8.

Feldman then applied to the Committee on Admissions of the District of Columbia bar for admission pursuant to a then-existent rule allowing a member of a bar of another jurisdiction to seek membership in the District bar without examination.[40] The Committee responded that Feldman's request could not be accepted because he was not a graduate of an accredited law school, and informed him that only the Court of Appeals had authority to make exceptions to this requirement.[41]

On June 13, 1977, Feldman petitioned the Court of Appeals to admit him to the bar without examination or, in the alternative, to permit him to sit for the examination.[42] In support of his application, Feldman set forth in detail his legal experience and training.[43] After several months passed in silence, his counsel, on March 6, 1978, wrote a letter to the Chief Judge of the Court of Appeals, seeking prompt action on the petition. This communication reiterated Feldman's qualifications for admission and suggested for the first time that

> barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions under the United States Constitution and the federal antitrust laws—questions that Mr. Feldman is prepared to pursue in the United States District Court if necessary.[44]

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[40] *Id.* ¶ 19, F. App. 8.

[41] *Id.* ¶¶ 20-22, F. App. 8-9. The Committee initially advised Feldman that no exceptions were authorized. After an informal hearing, it told Feldman that only the Court of Appeals could waive the rule. See notes 51, 61 *infra*.

[42] Petition of Marc Feldman for Admission to the Bar of the District of Columbia Without Examination [hereinafter cited as *Feldman Petition*], F. App. 17.

[43] *Id.* ¶¶ 1-7, F. App. 17-19.

[44] Letter, Robert M. Sussman to Hon. Theodore R. Newman, Jr., Mar. 6, 1978, at 1, F. App. 23.

Counsel devoted the last three pages of the letter to an outline of legal arguments, advising the Court of Appeals that these grounds would be raised in federal court should the threatened lawsuit come to pass.[45]

By letter shortly thereafter, the Chief Judge responded.[46] This communication stated that the Court of Appeals had referred Feldman's application to its Committee on Admissions for review;[47] that the Committee felt that Feldman "has had an exceptional opportunity for training and is a personable, impressive, and outstanding individual," but nevertheless had recommended unanimously that the court deny the petition;[48] and that the court had decided to accept the recommendation.[49] The Chief Judge explained:

> [T]he purpose of the rule . . . is to prevent the Committee and the Court from assuming the practically impossible task of making separate subjective evaluations of each applicant's training and education; hence an objective and reasonable standard as prescribed by the rule must be utilized.[50]

"Mr. Feldman, of course," the message concluded, "will be eligible to make an application for admission to the bar after he has completed five years of practice."[51] On the day following, the Court of Appeals—once again in

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[45] *Id.* at 5-7, F. App. 27-29.

[46] Letter, Hon. Theodore R. Newman, Jr., to Robert M. Sussman, Mar. 29, 1978, F. App. 32.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* See D.C. App. R. 461(c)(3)(i) (1978). The rule no longer contains an express education requirement for reciprocity admission.

a self-styled per curiam order [52]—denied Feldman's request for a waiver without additional comment.[53]

Feldman filed suit in the District Court about two months later. Like Hickey, he alleged violation of both the Fifth Amendment and the federal antitrust laws.[54] The court concluded that Feldman sought essentially a review of a judicial order which, because of counsel's letter to the Chief Judge, "fully encompassed the constitutional and statutory issues raised." [55] The court accordingly ruled that it lacked jurisdiction and dismissed the action.[56] Feldman then appealed.

C. *The Issues*

Appellees press two broad objections to the District Court's jurisdiction in these cases. First, they urge that the antitrust claims advanced by appellants are frivolous, and therefore were properly dismissed for failure to raise any substantial federal question.[57] Second, appellees contend that what appellants actually seek is review of judgments of the highest court of the District of Columbia, and thus are defeated by the express congressional reservation of that authority to the Supreme Court of the United States.[58] Alternatively with respect to appellant Feldman, it is suggested that even if the District Court had jurisdiction, the doctrine of

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[52] See text *supra* at note 22.

[53] *Feldman Complaint, supra* note 33, Ex. E, F. App. 33.

[54] *Id.* ¶¶ 28, 30-32, F. App. 10-12.

[55] *Feldman* v. *Gardner*, Civ. No. 78-0957 (D.D.C. Oct. 24, 1978) (memorandum opinion) at 4, [hereinafter cited as *Feldman Order*], F. App. 50.

[56] *Id.*

[57] Discussed in Part II *infra*.

[58] Discussed in Part III *infra*.

res judicata barred that court's consideration of the issues he raised therein because, it is said, the same questions were previously put to the Court of Appeals by the letter written by his counsel.[59] We consider each of these arguments in turn.

II. The Antitrust Claims

Jurisdiction to entertain federal antitrust lawsuits is vested solely in the federal courts.[60] So, whatever the

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[59] Discussed in Part IV *infra*. It is also contended that principles of comity and federalism counsel judicial restraint in these cases. Regulation of the legal profession, to be sure, is largely the province of the states and the District of Columbia, but the federal courts nevertheless have a responsibility to listen when a litigant charges constitutional or federal statutory violations. As the Supreme Court has observed,

> [w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Reynolds v. *Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506, 530 (1964) (footnote omitted), quoting *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 130, 5 L.Ed.2d 110, 117 (1960). See also note 200 *infra*.

[60] *General Investment Co.* v. *Lake Shore & M. So. Ry.*, 260 U.S. 261, 287, 43 S.Ct. 106, 117, 67 L.Ed. 244, 260 (1922). See generally, J. von Kalinowski, 14 Anti-trust Laws and Trade Regulations §§ 104.01, 104.02 (1980). See 15 U.S.C. §§ 4, 25 (1976); 28 U.S.C. § 1337 (1976), *as amended by* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 9(a), 92 Stat. 1633; Act of Oct. 10, 1980, P. L. No. 96-417, 94 Stat. 1743 (1980).

The Court's "affirmance" in *Bates* v. *State Bar of Arizona*, 430 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)—of the decision of the Supreme Court of Arizona that its ban on lawyer advertising did not violate federal antitrust law—should not be mistaken as a recognition of state-court jurisdiction to entertain federal antitrust suits. The *Bates* plaintiffs raised an antitrust argument before the Arizona high court as a defense in a proceeding to enforce a disci-

nature of the proceedings in the District of Columbia Court of Appeals on appellants' waiver petitions, they unquestionably have the right to present their antitrust claims in a federal forum. The issue at the core of the antitrust charges, then, is whether appellants stated any cognizable cause of action,[61] and thus should not have suffered dismissal.

Mere proffer of a problem implicating the antitrust laws does not necessarily suffice, however; subject-matter jurisdiction of the federal courts is dependent upon a suit "arising under" such laws.[62] That does not occur

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plinary rule, and that court dealt with the argument for what it was—a defensive challenge to the validity of the rule, not an original antitrust action. See *Matter of Bates*, 113 Ariz. 394, 555 P.2d 640, 642 (1976). For a more complete discussion of *Bates*, see text *infra* at notes 79-81.

[61] The District Court dismissed Feldman's federal antitrust claim on a different ground—that it had been resolved by the District of Columbia Court of Appeals and thus could be reviewed only by the Supreme Court. See Feldman Order, *supra* note 55, at 4, F. App. 50. We believe this rationale to be erroneous, both because there was no adjudication on the merits of that claim by the Court of Appeals, see Part III *infra*, and because the District Court has exclusive original jurisdiction over federal antitrust actions. See note 60 *supra*. We affirm the dismissal on the basis of the analysis set forth in text. See note 201 *supra*.

We note further that although Feldman directed his complaint against the Committee on Admissions and its secretary as well as against the Court of Appeals and its members, see note 3 *supra*, in the antitrust context we perceive no basis for a claim against the Committee. The challenged rule was promulgated by the Court of Appeals, and the Court of Appeals has the ultimate responsibility for its enforcement. The Committee's functions are limited; it acts primarily in an adversary capacity. See note 41 *supra* and note 193 *infra*. Consequently our discussion in this part addresses only the potential liability of the Court of Appeals.

[62] See 28 U.S.C. § 1337 (1976), *as amended by* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 9(a), 92 Stat. 1633; Act

when the "issue tendered by the complaint [is] either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." [63] In light of this principle, appellees invite us to affirm the dismissal of appellants' Sherman [64] and Clayton Act [65] claims, insisting that they are "obviously without merit." [66] The opposing contentions advanced by appellants boil the essential inquiry down to but one: May the District of Columbia Court of Appeals be sued [67] for alleged antitrust violations by reason of its adoption of a rule limiting admission to the bar examination to candidates who have completed a prescribed minimum of education in an ABA-accredited law school? We hold that it may not.

A. *The State Action Doctrine*

In defending against appellants' arguments, appellees have relied upon the "state action" exemption from antitrust liability. Although this doctrine originated much earlier,[68] its principal exposition came in *Parker* v.

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of Oct. 10, 1978, Pub. L. No. 96-417, tit. V, § 505, 94 Stat. 1743.

[63] *Hagans* v. *Levine*, 415 U.S. 528, 539, 94 S.Ct. 1372, 1380, 39 L.Ed.2d 577, 589 (1974). See also *Bell* v. *Hood*, 327 U.S. 678, 682-683, 66 S. Ct. 773, 776, 90 L.Ed. 939, 943 (1946).

[64] Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976).

[65] Clayton Act, § 4, 15 U.S.C. § 15 (1976).

[66] *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152, 153 (1933).

[67] See note 3 *supra*.

[68] In *Eastern R.R. Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Supreme Court traced the origin of the doctrine to *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). *Standard Oil* read the Sherman Act to "forbid[] only those trade restraints and monopolizations that are

Brown,[69] decided in 1943. The Supreme Court there upheld a California program designed to restrict competition among growers in order to maintain prices in the raisin market, reasoning that the state, as "a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." [70] In two much more recent cases, *Goldfarb* v. *Virginia State Bar* [71] and *Bates* v. *State Bar of Arizona*,[72] the Court elaborated on the state action concept in the context of purported anticompetitive regulation of the legal profession.

In *Goldfarb*, the Court struck down a minimum fee schedule promulgated by a county bar association under the direction of the state bar of Virginia. The Court emphasized that the state itself had not directed the issuance of the fee schedule.[73] Noting that the bar

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created, or attempted, by the acts of 'individuals or corporations.'" *Eastern R.R. Conference* v. *Noerr Motor Freight, Inc.*, *supra*, quoting *Standard Oil* v. *United States*, *supra*, 221 U.S. at 57, 31 S.Ct. at 514, 55 L.Ed. at 644. The *Noerr* opinion explained that, "accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136, 81 S.Ct. at 529, 5 L.Ed.2d at 470. See *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 59 S.Ct. 933, 83 L.Ed. 1446 (1939). This interpretation apparently was first made in *Olsen* v. *Smith*, 195 U.S. 332, 345, 25 S.Ct. 52, 55, 49 L.Ed. 224, 230-231 (1904).

[69] 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

[70] *Id.* at 352, 63 S.Ct. at 314, 87 L.Ed. at 326-327.

[71] 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

[72] *Supra* note 60.

[73] 421 U.S. at 788-792, 95 S.Ct. at 2013-2016, 44 L.Ed.2d at 585-588. The county bar association was a private organization, see *id.* at 779, 790, 95 S.Ct. at 2009, 2015, 44 L.Ed.2d at 580, 586-587, and the state bar was a state agency only

groups' "arguments, at most, constitute a contention that their activities complemented the objective of the [state's] ethical codes," [74] the Court declared that "[i]n our view that is not state action for Sherman Act purposes." [75] Significantly for the instant cases, however, the Court stressed that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the state to regulate its professions." [76] The Court described this authority as based on the states' "compelling interest in the practice of professions within their boundaries," which gives them "broad power to establish standards for licensing practitioners in regulating the practice of professions." [77] The Court cogently observed that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " [78]

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for limited purposes. *Id.* at 766 & n.2, 789-790, 791, 95 S.Ct. at 2007 & n.2, 2014-2015, 44 L.Ed.2d at 578 & n.2, 586-587. The Virginia legislature had authorized the Supreme Court of Appeals of Virginia to regulate the practice of law, *id.* at 789 & n.18, 95 S.Ct. at 2014 & n.18, 44 L.Ed.2d at 586 & n.18, and that court had adopted ethical codes, *id.* at 789, 95 S.Ct. at 2014, 44 L.Ed.2d at 586, but "it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities" under attack. *Id.* at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

[74] *Id.* at 791, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

[75] *Id.*

[76] *Id.* at 793, 94 S.Ct. at 2016, 44 L.Ed.2d at 588. Although the discussion in text focuses on the Sherman Act in our view the state-action doctrine is equally applicable to alleged violations of the Clayton Act.

[77] *Id.* at 792, 94 S.Ct. at 2016, 44 L.Ed.2d at 588.

[78] *Id.*

In *Bates*, the Court sustained against antitrust objection a rule of prohibiting advertising by lawyers. That rule, the Court found, was "the affirmative command of the Arizona Supreme Court, . . . the ultimate body wielding the State's power over the practice of law." [79] Contrasting the bar-created fee schedule successfully attacked in *Goldfarb*, the Court noted that the complaint in *Bates* was not anticompetitive behavior by lawyers but a "restraint . . . 'compelled by direction of the State acting as a sovereign.'" [80] Referring to its admonition in *Goldfarb* that no dilution of the states' authority to regulate their professions was intended, the Court pointed out that "[a]llowing the [*Bates*] Sherman Act challenge to the disciplinary rule would have precisely that undesired effect." [81]

In the cases before us, the parties have focused their arguments on the tests developed in *Parker* and its prodigy for determining whether there is sufficient state action to immunize alleged anticompetitive practices. These tests require courts to ascertain whether there is a clear articulation of state policy accompanied by active supervision by the state.[82] This inquiry becomes necessary

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[79] 433 U.S. at 360, 97 S.Ct. at 2697, 53 L.Ed.2d at 821.

[80] *Id.*

[81] *Id.* at 360 n.11, 97 S.Ct. at 2697 n.11, 53 L.Ed.2d at 821 n.11.

[82] *Parker* v. *Brown*, *supra* note 69, 317 U.S. at 351-352, 63 S.Ct. at 313-314, 87 L.Ed.2d at 326. See also, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233, 243 (1980); *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109-111, 99 S.Ct. 403, 412-413, 58 L.Ed.2d 361, 375-377 (1978); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 408-417, 98 S.Ct. 1123, 1134-1139, 55 L.Ed.2d 364, 380-385 (1978) (plurality opinion); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593,

when an act by a subordinate government agency is at stake, for it is well settled that not everything it does is an act of the state as a sovereign.[83] There obviously is no need for any investigation of that sort when the action plainly is taken in a sovereign capacity. Thus in *New Mexico* v. *American Petrofina*,[84] the Ninth Circuit held that "a state cannot be sued for alleged violations of Sections 1 and 2 of the Sherman Act," [85] explaining that cases like *Parker* v. *Brown*

> involved suits against allegedly private defendants . . . or a state created corporation intended to manage a monopoly in the public interest.
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> In either situation, it is necessary to determine whether the anti-competitive result actually is a goal of the state entitled to the state's immunity. . . . [C]ourts are understandably reluctant to apply the state's immunity to private parties without a clear indication by the state's legislature that the anti-competitive results have its sanction.
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> But there is no indication from those cases that the legislature must declare its intent to supplant competition in an industry when there is no question that the conduct is committed by the state.[86]

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96 S.Ct. 3110, 3118-3119, 49 L.Ed.2d 1141, 1150-1151 (1976); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 389, 71 S.Ct. 745, 748, 95 L.Ed. 1035, 1045 (1951).

[83] See cases cited *supra* note 82.

[84] 501 F.2d 363 (9th Cir. 1974).

[85] *Id.* at 372.

[86] *Id.* at 369-370. To the extent that the Ninth Circuit applied this same analysis to political subdivisions we disagree. Political subdivisions are not equivalent to a state, as the Supreme Court held in *City of Lafayette* v. *Louisiana Power & Co.*, *supra* note 82.

We agree. While activity of private parties prompted by purported state policies [87] or pursuant to state regulatory schemes,[88] or even acts of subordinate governmental agencies,[89] are not always entitled to the shield of the state's antitrust exemption, acts of the state in its sovereign character are invulnerable. This view of governmental immunity is traceable back to the earliest days of federal antitrust lawmaking,[90] and was reaffirmed by the Supreme Court as late as 1978. In *City of Lafayette* v. *Louisiana Power & Light Co.*,[91] the Court warned that it is incorrect to characterize *Parker* as holding "that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws." [92] Proceeding with this analysis, the Court contrasted the presence of sovereign state action in *Parker* with its absence in *Goldfarb*,[93] observing that "no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum-fee schedules" in that case.[94] But while *Goldfarb* lacked an exertion of state sovereignty, that element was evident in *Bates*, where the Supreme Court of Arizona—"the ultimate body wielding the State's power over

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[87] See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, *supra* note 71.

[88] See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Alumnium, Inc.*, *supra* note 82.

[89] See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra* note 82.

[90] See note 68 *supra*.

[91] *Supra* note 82.

[92] 435 U.S. at 408, 98 S.Ct. at 1134, 55 L.Ed.2d at 380.

[93] *Id.* at 408-410, 98 S.Ct. at 1134-1135, 55 L.Ed.2d at 379-381.

[94] *Id.* at 409-410, 98 S.Ct. at 1135, 55 L.Ed.2d at 380-381.

the practice of law [95]—had clearly articulated and actively supervised the allegedly anticompetitive non-advertising rule there in issue.[96]

The degree of involvement of the governmental body possessing capacity to exercise a sovereign prerogative is thus crucial. In *City of Lafayette*, the Court applied this analysis to municipalities, concluding that while "states are sovereign, save only as Congress may constitutionally subtract from their authority," [97] municipalities are not themselves sovereign, nor do they receive "the federal deference of the States that create them" [98] unless the anticompetitive activity in suit was undertaken by the municipality acting as the state's agent at the state's direction.[99] But regulation by a state legislature of admission to the state's bar clearly would stand on an entirely different footing, as does that activity when conducted by a state court endowed with the "ultimate" authority to do so.[100] In either case, the regulatory act brings to bear the sovereignty of the state, and immunity from federal antitrust liability attaches.

B. *The Status of the Court of Appeals*

We are therefore confident that were the District of Columbia a state for purposes of the federal antitrust

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[95] *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra* note 82, 435 U.S. at 410, 98 S.Ct. at 1135, 55 L.Ed.2d at 381, quoting *Bates* v. *State Bar of Arizona*, *supra* note 60, 433 U.S. at 360, 97 S.Ct. at 2697, 53 L.Ed.2d at 821.

[96] *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra* note 82, 435 U.S. at 410, 98 S.Ct. at 1135, 55 L.Ed.2d at 381.

[97] *Id.* at 400, 98 S.Ct. at 1130, 55 L.Ed.2d at 374-375.

[98] *Id.* at 412, 98 S.Ct. at 1136, 55 L.Ed.2d at 382.

[99] *Id.* at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383.

[100] See *Bates* v. *State Bar of Arizona*, *supra* note 60, 433 U.S. at 360, 97 S.Ct. at 2697, 53 L.Ed.2d at 821.

laws, its Court of Appeals would be amply shielded. But "the District of Columbia is constitutionally distinct from the States," [101] and we do not believe that in the antitrust context it can be likened to a state. In addressing state-action problems in the antitrust field, the Supreme Court has repeatedly emphasized that fundamental considerations of federalism underlie the exemption doctrine.[102] Inherent in our system of government is the concept of dual sovereignty; each state is sovereign, except to the extent that its sovereignty is curtailed by the Constitution or validly restricted by Congress.[103] It is for this reason that "an unexpressed purpose [in the antitrust laws] to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." [104] These basic concerns do not arise, however, with respect to the District of Columbia; despite the recent enactment of legislation giving the District greater autonomy,[105] it remains a federal enclave lacking the sovereignty inherent in statehood.

In the same breath, we reject any notion that the District of Columbia Court of Appeals is merely a municipal unit for purposes of the antitrust question posed in this

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[101] *Palmore* v. *United States*, 411 U.S. 389, 395, 93 S.Ct. 1670, 1675, 36 L.Ed.2d 342, 350 (1973).

[102] See cases cited *supra* note 82.

[103] *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra* note 82, 435 U.S. at 400, 98 S.Ct. at 1130, 55 L.Ed.2d at 374-375.

[104] *Id.* See *Parker* v. *Brown*, *supra* note 69, 317 U.S. at 351, 63 S.Ct. at 313, 87 L.Ed.2d at 326.

[105] See, *e.g.*, District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, § 111, 84 Stat. 475, D.C. Code §§ 11-101 *et seq.* (1973) [hereinafter cited as codified]; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified variously).

litigation. It is a creature, not of the District of Columbia Government, but of Congress itself;[106] it is "[t]he highest court of the District of Columbia," whose "[f]inal judgments and decrees . . . are reviewable by the Supreme Court of the United States,"[107] as are those of the state courts of last resort.[108] As such, the Court of Appeals is the final arbiter of local law,[109] and is specifically vested by Congress with the power to regulate admissions to the District of Columbia bar.[110] Authority of this type and scope is not enjoyed by courts of municipalities.

In short, the District of Columbia cannot be characterized as a state in relation to the federal antitrust laws. It is, rather, a semi-autonomous governmental unit, an entity unique in our governmental structure. But whatever the status of the District's legislative and executive branches in the hierarchy of antitrust exemption, the Court of Appeals is plainly a federal instrumentality armed with the supreme judicial power over nonfederal subject matter in the District. We are mindful that on a prior occasion we held that the District of Columbia Armory Board, set up by Congress expressly to provide a stadium for District of Columbia sports teams, was

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[106] D.C. Code §§ 11-701 to 11-743 (1973).

[107] D.C. Code § 11-102 (1973).

[108] 28 U.S.C. § 1257 (1976). See, however, *Key* v. *Doyle*, 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977); *Palmore* v. *United States*, *supra* note 101.

[109] See *Church of Scientology* v. *Foley*, —— U.S.App.D.C. ——, —— n.63, —— F.2d ——, —— n.63 (dissenting opinion), *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1980); *Thompson* v. *United States*, 179 U.S.App.D.C. 76, 80, 548 F.2d 1031, 1035 (1976).

[110] D.C. Code § 11-2501(a) (1973), quoted in text *infra* at note 117.

not immune from antitrust liability.[111] The Armory Board, however, was commissioned to operate that facility as a private venture,[112] a mission entirely different from that of the Court of Appeals. The court was established by Congress to head the local judiciary in an indispensable function of government,[113] and was invested with powers virtually identical to those of the highest courts of the states.[114] The Court of Appeals is not a governmental entity simply substituting for private enterprise, nor one seeking refuge merely in the fact that it is a governmental instrumentality.[115]

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[111] *Hecht* v. *Pro-Football, Inc.*, 144 U.S.App.D.C. 56, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972).

[112] *Id.* at 71, 444 F.2d at 944.

[113] Congress created and endowed jurisdictionally the District of Columbia courts. No less than those courts, the federal courts here and across the Nation owe their existence and authority to Congress. From the viewpoint of government in the District, tribunals possessing jurisdiction over nonfederal matters was as much a sheer necessity as tribunals handling federal judicial business. Congress deliberately chose to establish the two systems of courts in the District, *Palmore* v. *United States*, *supra* note 101, 411 U.S. at 406-407, 93 S.Ct. at 1681, 36 L.Ed.2d at 357, and each discharges in its own sphere the essential judicial functions of government as much as the other.

[114] See text *supra* at notes 107-110.

[115] Thus, the position of the Court of Appeals is far different from that of the Armory Board in *Hecht;* the court engages in governmental actions of far greater importance. See 144 U.S.App.D.C. at 72, 444 F.2d at 947. Nor is the situation of the Court of Appeals merely that of a federal regulator of industry, the antitrust status of which normally is to be analyzed on a case-by-case basis. See *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra* note 82, 435 U.S. at 398-399, 98 S.Ct. at 1129, 55 L.Ed.2d at 374; *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 & n.28,

Without a doubt, the Court of Appeals has the same compelling interest as a state supreme court in regulating the bar of its jurisdiction. While we would not lightly attribute to Congress a desire to counter the important objectives of the federal antitrust policies, we have great difficulty in imagining an intent to disturb the traditional authority of courts to meet one of their most vital needs—determining who will be admitted to practice before them as court officers.[116] Here Congress issued a clear legislative mandate:

> The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.[117]

Responding to the directive of this legislation, the court, by conditioning admission to the bar examination upon educational attainment in an ABA-approved law school, acts no differently than the vast majority of states in the constant effort to assure the public that members of the bar are qualified lawyers.[118] And "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." [119] It would fly in the face of congressional intent in conferring this broad and essential regulatory authority

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83 S.Ct. 1715, 1734-1735 & n.28, 10 L.Ed.2d 915, 937 & n.28 (1963) (collecting cases). See also *Hecht* v. *Pro-Football, Inc.*, *supra* note 111, 144 U.S.App.D.C. at 67-69, 444 F.2d at 942-944.

[116] See *Goldfarb* v. *State Bar of Virginia*, *supra* note 71, 421 U.S. at 792, 95 S.Ct. at 2016, 44 L.Ed.2d at 588.

[117] D.C. Code § 11-2501(a) (1973).

[118] See note 7 *supra*.

[119] *Leis* v. *Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 700, 58 L.Ed.2d 717, 711 (1979).

upon the court to rule that it could become exposed to antitrust liability when it exercises it.

We hold that the Court of Appeals—as "the ultimate body wielding [governmental] power over the practice of law" in the District of Columbia [120]—acts in a sovereign governmental capacity—as sovereign as an exertion of judicial power can ever be—when it sets and enforces educational prerequisites for admission to the bar examination. It may be that appellants could have sued ABA, if indeed that organization engages in anticompetitive behavior and thereby inflicts injury upon them.[121] They cannot, however, subject the Court of Appeals to a charge of antitrust violation. We affirm the dismissal of appellants' antitrust claims.

III. The Constitutional Claims

A. *Jurisdictional Considerations*

More than a century ago the Supreme Court, in *Ex Parte Secombe*,[122] recognized as even then "well-settled" the principle that a court has exclusive authority "to determine who is qualified to become one of its officers, as an attorney and counsellor. . . ." [123] Never over the many years since *Secombe* has this thesis been seriously challenged, nor has the related proposition that admis-

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[120] See *Bates* v. *State Bar of Arizona*, *supra* note 60, 433 U.S. at 360, 97 S.Ct. at 2697, 53 L.Ed.2d at 821.

[121] Compare *Marjorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges & Secondary Schools*, 139 U.S. App.D.C. 217, 432 F.2d 650, *cert. denied*, 400 U.S. 965, 90 S.Ct. 367, 27 L.Ed.2d 384 (1970); *Paralegal Inst., Inc.* v. *ABA*, 475 F.Supp. 1123 (E.D.N.Y. 1979), *aff'd* 622 F.2d 575 (2d Cir. 1980).

[122] 60 U.S. (19 How.) 9, 15 L.Ed. 565 (1857).

[123] *Id.* at 13, 15 L.Ed. at 565.

sion to a state's bar normally is a nonfederal matter. Yet the litigation before us is not disposed of merely by invocation of this broad regulatory power. Its exercise, like any other exertion of governmental authority, is subject to the commands of the Constitution, and redress for infringements of rights the Constitution guarantees ordinarily may be sought in the federal courts.[124] The propriety of resort to those courts after an earlier proceeding in a nonfederal court must be considered in light of established criteria, and this is the second task that the instant appeals summon us to perform.

The problem before us—whether the District Court was empowered to entertain the claims appellants founded on the Constitution—is multifaceted, and thus calls for step-by-step treatment. To begin with, while "[i]t is a principle of first importance that the federal courts are courts of limited jurisdiction," [125] there can be no doubt that with respect to those claims appellants met the minimum requirements for federal-question jurisdiction.[126] The threshhold requirements with regard to subject matter are satisfied when "the right of the [plaintiff] to recover under [the] complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they

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[124] See note 59 *supra*.

[125] C. Wright, *Federal Courts* § 7, at 17 (3d ed. 1976). See also *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274, 282 (1978).

[126] See 28 U.S.C. § 1331(a) (Supp. III 1979) ("[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States"). The jurisdictional-amount requirement has now been eliminated. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. See note 129 *infra*.

are given another." [127] That indisputably was the situation here. The amount in controversy prescribed by statute was established by appellants' good-faith valuation of the rights they assert, for definitely it did not "appear[ ] to a legal certainty that the claims [were] really for less than the jurisdictional amount . . . ." [128] Moreover, the jurisdictional amount is no longer a prerequisite to suits in which a "federal question" is at issue.[129] As appellees urge, however, in some instances prospective plaintiffs must clear additional jurisdictional obstacles if they are to bring suit in a federal district court,[130] and such a barrier confronts appellants here.

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[127] *Bell* v. *Hood, supra* note 63, 327 U.S. at 685, 66 S.Ct. at 777, 90 L.Ed. at 944. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 649, 83 S.Ct. 1441, 1444, 10 L.Ed.2d 605, 610 (1963); *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97, 81 L.Ed. 70, 72 (1936).

[128] *Gibbs* v. *Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 729, 83 L.Ed. 1111, 1115 (1939); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 590, 82 L.Ed. 845, 848 (1938); *Smithers* v. *Smith*, 204 U.S. 632, 642, 27 S.Ct. 297, 299, 51 L.Ed. 656, 660 (1907); *Hartigh* v. *Latin*, 158 U.S.App.D.C. 289, 293, 485 F.2d 1068, 1071 (1973), *cert. denied, District of Columbia* v. *Marsh*, 415 U.S. 948, 94 S.Ct. 1470, 39 L.Ed.2d 564 (1974); *Gomez* v. *Wilson*, 155 U.S.App. D.C. 242, 251, 477 F.2d 411, 420 (1973). Unless good faith appears to be lacking the sum claimed by the plaintiff controls.

[129] As noted above, the jurisdictional amount was eliminated by Congress late in 1980. See note 126 *supra*. We recently held that this amendment to § 1331 applies retroactively to cases pending on appeal. *Eikenberry* v. *Callahan*, No. 79-2915 (D.C. Cir., Apr. 30, 1981), at 11.

[130] "Constitutional power is merely the first hurdle that must be overcome. . . . For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but by Acts of Congress." *Owen Equip. & Erection Co.* v. *Kroger, supra* note 125, 437 U.S. at 372, 98 S.Ct. at 2402, 57 L.Ed.2d at 281. See *Palmore* v. *United States*,

Review of a final judgment of the highest judicial tribunal of a state is vested solely in the Supreme Court of the United States.[131] In 1970, Congress extended this exclusivity to judgments of the newly-reconstituted District of Columbia Court of Appeals.[132] Accordingly, we are in complete agreement with appellees that the District Court is powerless to reexamine determinations by the Court of Appeals in judicial proceedings.[133] But whether, for purposes of ascertaining the jurisdiction of a federal court, a particular proceeding before another

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supra note 101, 411 U.S. at 401, 93 S.Ct. at 1678, 36 L.Ed.2d at 353-354; *Lockerty* v. *Phillips*, 319 U.S. 182, 187, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339, 1342-1343 (1943); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 233-234, 43 S.Ct. 79, 82-83, 67 L.Ed. 226, 231-232 (1922).

[131] 28 U.S.C. § 1257 (1976):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

[132] The District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, § 172(a)(1), 84 Stat. 590 (1970), added at the end of 28 U.S.C. § 1257, quoted *supra* note 131, the following language: "For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals," a position previously filled by this court. See *Church of Scientology* v. *Foley*, No. 77-2134 (D.C. Cir. Jan. 8, 1981) at 16 n.63 (dissenting opinion); *Thompson* v. *United States*, *supra* note 109, 179 U.S.App.D.C. at 80, 548 F.2d at 1035.

[133] Brief for Appellees in No. 78-2235 at 36.

tribunal was truly judicial is a question of federal law, calling for close inspection of its features.[134] We conclude that the instant actions fell within the District Court's jurisdiction because, we find, the Court of Appeals' dispositions of appellants' waiver petitions emanated from proceedings that were not judicial in that sense.

B. *The Characteristics of Judicial Proceedings*

Not every effort pursued in court is judicial in quality. Many years ago in *Prentis* v. *Atlantic Coast Line Co.*[135] the Supreme Court emphasized that a determination of whether a tribunal has acted in a judicial capacity turns on the character of the proceeding and the nature of its outcome, rather than on the circumstance that the decisionmaking body was "at another moment, or in its principal or dominant aspect, . . . a court . . . ." [136] And, as we shall now see, *Prentis* is also highly instructive on other aspects of the core issue before us.

Prentis involved a constitutional assault in a federal circuit court on an order of the State Corporation Commission of Virginia which, under the state's constitution and statutes, was "clothed with legislative, judicial and executive powers," [137] and thus functioned at least part of the time as a judicial body.[138] The Virginia constitution provided that an appeal from a ratemaking order of the Commission could be taken only to the state's highest court, which was empowered to substitute its

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[134] See *In re Summers*, 325 U.S. 561, 566, 65 S.Ct. 1307, 1310-1311, 89 L.Ed. 1795, 1800 (1945), and cases there cited. See also cases cited *infra* note 200.

[135] 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

[136] *Id.* at 226, 29 S.Ct. at 69, 53 L.Ed. at 158.

[137] *Id.* at 224, 29 S.Ct. at 68, 53 L.Ed. at 158.

[138] *Id.* at 225-226, 29 S.Ct. at 69, 53 L.Ed. at 158.

own order if it found the challenge meritorious.[139] The *Prentis* litigation arose when the Commission established rates deemed confiscatory by affected railroads.[140]

The railroads' suit was resisted on the theory that in promulgating the rates the Commission acted as a court of the state, and that its order thus was statutorily immune from a lower federal court's injunction.[141] The Supreme Court disagreed, holding that the ratemaking proceeding before the Commission was legislative and not judicial.[142] Sharply differentiating between the two, the Court explained:

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[139] *Id.* at 224-225, 29 S.Ct. at 68-69, 53 L.Ed. at 158.

[140] *Id.* at 223, 225, 29 S.Ct. at 68, 69, 53 L.Ed. at 157, 158.

[141] *Id.* at 223, 29 S.Ct. at 68, 53 L.Ed. at 157. See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, as amended, 28 U.S.C. § 2283 (1976). See also note 142 *infra*.

[142] *Id.* at 226-228, 29 S.Ct. at 69-70, 53 L.Ed. at 158-159. The concern of the *Prentis* Court was the familiar Anti-Injunction Act, which originally was phrased to outlaw injunctions "to stay proceedings in any court of a state." Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335. In *Prentis'* era, the Act provided:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Rev. Stat. § 720 (1874). In current text, the Act specifies:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (1976). The term "proceedings" is to be read broadly as "includ[ing] all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process," *Hill* v. *Martin*, 296 U.S. 393,

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past

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403, 56 S.Ct. 278, 282, 30 L.Ed. 293, 298-299 (1935), and the statutory bar not only endures while the proceedings are in progress, but also defies circumvention by "prohibiting utilization of the results of a completed state court proceeding." *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234, 241 (1970); see also *Hill* v. *Martin*, *supra*, 296 U.S. at 403, 56 S.Ct. at 278, 80 L.Ed. at 293; *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 779 (3d Cir. 1975). But the Act immunizes only proceedings "in a State court," hence the need to ask whether in those proceedings the tribunal was acting judicially. See *Roudebush* v. *Hartke*, 405 U.S. 15, 21-22, 92 S.Ct. 804, 808-809, 31 L.Ed.2d 1, 9-10 (1972); *Public Serv. Co.* v. *Corboy*, 250 U.S. 153, 161-162, 39 S.Ct. 440, 441-442, 63 L.Ed. 905, 909 (1919); *Prentis* v. *Atlantic Coast Line Co.*, *supra* note 135, 211 U.S. at 226-228, 29 S.Ct. at 69, 53 L.Ed. at 159; *Armstrong* v. *Maple Leaf Apartments*, 508 F.2d 518, 523 (10th Cir. 1974).

The scope of the inquiry appropriate in the cases at bar is not widened by appellees' contention that appellants' sole recourse was to the Supreme Court. For a half-century it has been settled that the Court cannot engage in the decision of questions of an administrative character, but only of those in such form that the judicial power is capable of acting upon them. *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 444, 43 S.Ct. 445, 449, 67 L.Ed. 731, 736 (1923); *Federal Radio Comm'n* v. *General Elec. Co.*, 281 U.S. 464, 469, 50 S.Ct. 389, 390-391, 74 L.Ed. 969, 972 (1930); *id.* at 469-470, 50 S.Ct. at 390-391, 74 L.Ed. at 972 (noting that jurisdiction exercised in suits to set aside orders of the Interstate Commerce Commission and the Federal Trade Commission "is not administrative, but strictly judicial, and therefore quite unlike jurisdiction exercised on appeals from the Radio Commission"); *id.* at 470, 50 S.Ct. at 391, 74 L.Ed. at 972 (describing the proceeding there under review as "not a case or controversy in the sense of the judiciary article, but . . . an administrative proceeding, and therefore the decision therein is not reviewable by this Court"). See also *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 274-278, 53 S.Ct. 627, 631-633, 77 L.Ed. 1166, 1172-1175 (1933). Con-

> facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. . . .
>
> Proceedings legislative in nature are not proceedings in a court within the meaning of [the anti-injunction statute], no matter what may be the general or dominant character of the body in which they may take place. . . . That question depends not upon the character of the body but upon the character of the proceedings. . . .[143]

Equally important to the cases before us, the *Prentis* Court made clear that a nonjudicial proceeding does not become judicial simply because it addresses the same questions that might have been developed in a judicial action involving the identical subject matter:

> [I]t does not matter what inquiries may have been made as a preliminary to the legislative act. . . . [T]he effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . [S]o when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.[144]

And the Court left no doubt that these principles apply not only to an administrative agency but also to a full-fledged court engaged in a nonjudicial proceeding:

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sequently, the District Court's jurisdiction here hangs on the answer to the question posed identically in *Prentis:* was the proceeding in the local tribunal judicial?

[143] 211 U.S. at 226, 29 S.Ct. at 69, 53 L.Ed. at 158-159.

[144] *Id.* at 227, 29 S.Ct. at 70, 53 L.Ed. at 159.

> [The state court's] action in [confirming the rate] would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.[145]

Since deciding *Prentis*, the Supreme Court has reaffirmed the distinction between judicial and nonjudicial actions, not only in the ratemaking context in which the problem originally arose[146] but in other areas as well.[147] For example, in *Public Service Co.* v. *Corboy*,[148] faced with the question whether a federal district court could enjoin allegedly unconstitutional action of a state court engaged in construction contracting, the Supreme Court drew upon the *Prentis* rationale:

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[145] *Id.*

[146] *E.g., Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17, 30, 49 S.Ct. 5, 8, 69 L.Ed. 150, 156 (1924); *Louisville & N. R.R.* v. *Garrett*, 231 U.S. 298, 307, 34 S.Ct. 48, 51-52, 58 L.Ed. 229, 240 (1913).

[147] *E.g., Roudebush* v. *Hartke*, *supra* note 142, 405 U.S. at 20-23, 92 S.Ct. at 808-809, 31 L.Ed.2d at 8-10 (1972); *In re Summers*, *supra* note 134, 325 U.S. at 567, 65 S.Ct. at 1311, 89 L.Ed. at 1800. *Public Serv. Co.* v. *Corboy*, *supra* note 142, 250 U.S. at 161-162, 39 S.Ct. at 441-442, 63 L.Ed. at 909; *Armstrong* v. *Maple Leaf Apartments*, *supra* note 142, 508 F.2d at 523; *Central Elec. & Gas Co.* v. *City of Stromsburg*, 192 F.Supp. 280, 295 (D. Neb. 1960), *aff'd*, 289 F.2d 217 (8th Cir. 1961); *Virginia Nat'l Bank* v. *Virginia ex rel. State Corp. Comm'n*, 320 F.Supp. 260 265-266 (E.D. Va. 1970), *appeal dismissed*, 448 F.2d 425 (4th Cir. 1971). See also cases cited *supra* note 142. And see *Lathrop* v. *Donohue*, 367 U.S. 820, 827, 81 S.Ct. 1826, 1829-1830, 6 L.Ed.2d 1191, 1196 (1961) (state court's promulgation of rules and bylaws creating integrated state bar "had the characteristics of legislation").

[148] *Supra* note 142.

> [A]lthough the Constitution did not limit the power of the States to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its exertion, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which in their constitutional sense were non-judicial in character and therefore not within the implied or express limitation by which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject-matter with which they are called upon to deal, but merely upon a state classification.[149]

Similarly, in *Roudebush* v. *Hartke*,[150] the Supreme Court reversed a federal district court's refusal to enjoin implementation of a state court's decision to hold a recount in a federal election pursuant to a state statute purporting to make the new reckoning mandatory when certain prerequisites were met. The Court rejected the argument that the state body was a judicial entity against which no injunction could issue from a lower federal court, stating:

> The exercise of these limited responsibilities does not constitute a court proceeding . . . within the test of *Prentis*: . . . The state courts' duties in connection with a recount may be characterized as ministerial, or perhaps administrative, but they clearly do not fall within this definition of a "judicial inquiry." [151]

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[149] 250 U.S. at 162, 39 S.Ct. at 442, 63 L.Ed. at 909.

[150] *Supra* note 142.

[151] 405 U.S. at 21, 92 S.Ct. at 809, 31 L.Ed.2d at 9.

These decisions make it evident that the waiver denials at issue in the cases at bar did not become judicial orders simply because the tribunal issuing them ordinarily functions as a court. Nor is the fact that the Court of Appeals' pronouncement on the waiver petitions were denominated per curiam orders dispositive; the teaching of *Prentis* is that the character of the proceedings is decisive. Thus, "[t]he nature of the final act," and not the nature of the issue, "determines the nature of the previous inquiry;" and only orders which declare or enforce rights and liabilities rise to the level of judicial action.[152]

In an effort to bolster the proposition that appellants should have gone from the Court of Appeals to the Supreme Court rather than to the District Court, appellees place heavy reliance on the Supreme Court's decision in *In re Summers*,[153] the only case in which the Court has addressed the mutual exclusivity of its direct-review authority and district-court jurisdiction over action in the bar-admission context.[154] Summers, an applicant for

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[152] *Prentis* v. *Atlantic Coast Line Co.*, *supra* note 135, 211 U.S. at 227, 29 S.Ct. at 69, 53 L.Ed. at 158. See text *supra* at notes 143-144.

[153] *Supra* note 134. Several decisions by federal courts of appeals are also invoked, but all appear to us to be inapposite. See note 200 *infra*.

[154] Contrary to arguments made to us, the Supreme Court has never held that any and all types of state-court action regarding admission to the bar are automatically of a judicial character and therefore reviewable only by the Supreme Court. Reliance on *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1867), for that proposition is misplaced. Although the *Garland* Court described the admission of attorneys to the bar as an exercise of judicial power, it was not called upon, as we are on these appeals, to ascertain the proper forum for review of such decisions. When faced with the necessity of determining whether particular action is judicial,

admission to the Illinois bar, was denied a certificate of fitness by the character committee of the state's highest court because he had been a conscientious objector during World War II.[155] Summers then asked the court to overturn the committee's decision, protesting the ruling as transgressing on the First and Fourteenth Amendments.[156] The court declined to do so, whereupon Summers sought a writ of certiorari from the Supreme Court.[157]

The justices of the Illinois high court opposed the writ, arguing that Summers' petition had not inaugurated a judicial proceeding involving a case or controversy, but was simply an application for Summers' appointment as an officer of the court.[158] The Supreme Court disagreed, however, and consented to review the Illinois court's decision,[159] though ultimately sustaining it on the merits.[160] It is to this grant of certiorari, and the concommitant finding that the proceeding in the Illinois court was

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and hence immune from reexamination by lower federal district courts, the Supreme Court has stressed the nature of the inquiry and the relief sought. See text *supra* at notes 141-152 and text *infra* at note 164.

[155] *In re Summers*, *supra* note 134, 325 U.S. at 562-563, 65 S.Ct. at 1308-1309, 89 L.Ed. at 1797-1798.

[156] *Id.* at 563-564, 65 S.Ct. at 1309, 89 L.Ed. at 1798. "The petition set out that the sole reason for the Committee's refusal was that [Summers] was a conscientious objector to war, and averred that such reason did not justify his exclusion because of the due process clause of the Fourteenth Amendment." *Id.* at 564, 65 S.Ct. at 1309, 89 L.Ed. at 1798.

[157] *Id.* at 562, 65 S.Ct. at 1310, 89 L.Ed. at 1797.

[158] *Id.* at 564-565, 65 S.Ct. at 1310, 89 L.Ed. at 1799.

[159] *Id.* at 565-569, 65 S.Ct. at 1310-1312, 89 L.Ed. at 1799-1801.

[160] *Id.* at 569-573, 65 S.Ct. at 1312-1314, 89 L.Ed. at 1802-1803.

judicial, that appellees point as the ground for their contention that only the Supreme Court can now hear appellants' claims.

The Supreme Court began its analysis in *Summers* by reiterating that "[a] case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.'" [161] Amplifying this point, the Court then restated, in language only slightly different from the original, the *Prentis* test: "The form of the proceeding is not significant. It is the nature and effect which is controlling." [162] The Court found that the proceeding before the Illinois court was an adversary one because it sought relief expressly against the assertedly unconstitutional action of the character committee.[163] The Court concluded that "[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy," [164] and in Summers' instance was reviewable on writ of certiorari.[165] For reasons now to

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[161] *Id.* at 566-567, 65 S.Ct. at 1311, 89 L.Ed. at 1800, quoting *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819, 6 L.Ed. 204, 223 (1824).

[162] 325 U.S. at 567, 65 S.Ct. at 1311, 89 L.Ed. at 1800. The court did not actually cite *Prentis*, but pointed instead to *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933), which had expressed the test as follows: "In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance." *Id.* at 259, 53 S.Ct. at 346, 77 L.Ed. at 773.

[163] *In re Summers, supra* note 134, 325 U.S. at 567-568, 35 S.Ct. at 1311-1312, 89 L.Ed. at 1800-1801.

[164] *Id.* at 568, 65 S.Ct. at 1312, 89 L.Ed. at 1801.

[165] *Id.* at 568-569, 65 S.Ct. at 1312, 89 L.Ed. at 1801. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224, 229 (1963).

be explained, we think *Summers* does not govern here, and that the attempt to attribute judiciality to the proceedings in the Court of Appeals must fail.

At the very outset, the suggestion that the Court of Appeals' orders were products of judicial proceedings seems strange.[166] More seriously, it runs directly counter to *Prentis'* admonition that an inquiry is judicial in nature only when it is utilized as the medium for "in-

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[166] As appellants have aptly observed, the procedures followed in the Court of Appeals seem, to say the least, unorthodox for any matter really considered by a court under the auspices of its judicial authority. No docket entry was made; there apparently was no opportunity for submission of evidence; no formal hearing was held; no record was compiled; and there were no opposing parties in the classic sense. Brief for Appellant Hickey at 20-24, 35; Brief for Appellant Feldman at 48. Even more surprising, given appellees' insistent characterization of the proceedings as judicial, the court itself initiated an ex parte contact with ABA in an effort to assess the validity of the antitrust allegations raised by Feldman. See Letter, Alexander L. Stevas, Clerk, District of Columbia Court of Appeals, to Frederick R. Franklin, Staff Director, Section on Legal Education and Admissions to the Bar, American Bar Association, April 26, 1978, H. App. 105.

While certain, though, that distinctions may be drawn between these cases and *Summers*, we are advertent to the admonition that the mere form of the proceeding is not of controlling significance. See text *supra* at note 162. The fact that the court deviated from customary judicial procedure has obvious bearing on the question whether appellants' waiver proceedings were truly judicial, but standing alone it did not render them nonjudicial. "[T]he circumstances of the refusal" also are relevant, *In re Summers*, *supra* note 134, 325 U.S. at 566, 65 S.Ct. at 1310-1311, 89 L.Ed. at 1800; see *Brooks* v. *Laws*, *supra* note 4, 92 U.S.App.D.C. at 376, 208 F.2d at 27, but they do not necessarily convert the proceeding from judicial to nonjudicial, as *Summers* itself illustrates. The crucial question remains, as *Prentis* instructs, whether the final act was judicial in nature. See text *supra* at note 144.

vestigat[ing], declar[ing] and enforc[ing] liabilities." [167] The critical question is whether appellants presented the Court of Appeals with "[a] claim of a present right to admission to the bar," [168] without which the proceedings therein decidely could not have been judicial.[169] We think the answer plainly is that they did not, and that therein lies the most decisive of the differences between these cases and *Summers*.[170]

C. *The Nature of the Proceedings Before the District of Columbia Court of Appeals*

Examination of appellants' petitions to the Court of Appeals for waivers of Rule 46I(b) discloses immediately that neither asserted any sort of *right* to be admitted to the District of Columbia bar, or even to take the examination therefor. Instead, each petition asked the court to do no more than except the petitioner from the operation of the rule. And while the petitions were tendered to a court and concerned admission to the bar, neither circumstance rendered them judicial. In *Ktsanes* v. *Underwood*,[171] the Seventh Circuit held flatly that a

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[167] *Prentis* v. *Atlantic Coast Line Co.*, *supra* note 135, 211 U.S. at 226, 29 S.Ct. at 69, 53 L.Ed. at 158; see *Roudebush* v. *Hartke*, *supra* note 147, 405 U.S. at 21, 92 S.Ct. at 809, 31 L.Ed.2d at 9; *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 106, 90 S.Ct. 1648, 1665, 26 L.Ed.2d 100, 120 (1970) (Harlan, J., concurring in denial of certiorari); *cf. In re Summers*, *supra* note 134, 325 U.S. at 568, 65 S.Ct. at 1312, 89 L.Ed. at 1801 (judicial proceeding must involve claim and denial of right).

[168] See text *supra* at note 164.

[169] See text *supra* at notes 143, 164.

[170] See note 200 *infra*.

[171] *Ktsanes* v. *Underwood*, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933, 98 S.Ct. 1508, 55 L.Ed.2d 530 (1978).

petition requesting a state court to waive one of its rules on bar admission sought "ministerial action, not judicial determination," [172] and that the ensuing denial of the petition "was made by the court acting in an administrative capacity." [173] We are satisfied that the same conclusion follows here.

The validity of these observations with respect to appellant Hickey is readily apparent; for him, as did the Seventh Circuit for the bar candidate in *Ktsanes*, we can easily say that "we have exactly the opposite set of circumstances" [174] from those present in *Summers*. And while appellant Feldman's situation is somewhat less clear, it calls for a similar outcome.[175]

As earlier noted, Hickey conceded the applicability of Rule 46I(b) to him.[176] He entreated the Court of Appeals to grant an exemption because of his substantive qualifications, unique background, reasonable expectations that he would be allowed to take the bar examination, and general equitable considerations based on his age, service to his country, and family status.[177] He presented no legal arguments whatsoever, nor did he demand admission to the examination as a matter of legal entitlement. In short, he merely asked the court to exercise its administrative discretion to permit him to take the test. The court was thus solicited to make a policy decision equating his personal qualities with accredited legal education, not an adjudication requiring resort to legal

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[172] *Id.* at 743.

[173] *Id.*

[174] *Id.*

[175] See text *infra* at notes 180-200.

[176] See text *supra* at notes 17-20.

[177] See Hickey Petition, *supra* note 17, at 2-5, H. App. at 18-21.

principles.[178] Thus, Hickey's request can hardly be viewed as "[a] claim of a present right to admission to the bar," [179] or to the examination affording the opportunity therefor.

Although at first glance appellant Feldman's case appears more difficult, we are no less convinced that the claim-of-right element was likewise lacking, as a single contrast points up. As the Supreme Court stated, Summers' "petition set out that the sole reason for the Committee's refusal was that [Summers] was a conscientious objector to war, and averred that such reason did not justify his exclusion because of the due process clause of the Fourteenth Amendment." [180] On the other hand, Feldman's petition to the Court of Appeals did not

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[178] Hickey's case thus differs critically from Summers'. See note 164, *supra*, and accompanying text.

[179] See text *supra* at note 164. As the Seventh Circuit emphasized in the analogous case of *Ktsanes* v. *Underwood*, *supra* note 171, the applicant for waiver

> never argued the question of the validity of [the rule] before the [highest court of the jurisdiction]. He was asking for ministerial action, not judicial determination. The denial of his petition was made by the court acting in an administrative capacity. *See Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 158 n.9, 91 S.Ct. 720, [724 n.9,] 27 L.Ed.2d 749, [756 n.9] (1961) . . . . That denial did not present a case or controversy cognizable by an Article III court, and, thus, was not appealable to the Supreme Court of the United States.

552 F.2d at 743. It is noteworthy, too, that the *Summers* Court mentioned, as examples of nonjudicial proceedings, "the appointment of a clerk or bailiff or *the specification of the requirements of eligibility or the course of study for applicants for admission to the bar.* . . ." *In re Summers*, *supra* note 134, 325 U.S. at 566, 65 S.Ct. at 1310-1311, 89 L.Ed. at 1800 (emphasis supplied).

[180] *In re Summers*, *supra* note 134, 325 U.S. at 564, 65 S.Ct. at 1311-1312, 89 L.Ed. at 1798.

claim that a refusal of his waiver request would deny him any right at all. Rather, the petition invoked the administrative discretion of that body, simply asking that it temper its rule in his favor, for personal and not legal reasons.

We are mindful that the letter subsequently written by Feldman's counsel discussed his constitutional and antitrust positions, but we are not persuaded that it changed the essential nature of his effort in the Court of Appeals. The letter was written after a period of almost nine months of apparent inactivity on the waiver petition,[181] and put the court on notice of possible legal infirmities in the rule and of Feldman's intent to litigate them in federal court should his request to sit for the bar examination not be promptly granted.[182] We are unable

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[181] See text *supra* at notes 42-44.

[182] See text *supra* at note 45. While, in an effort toward simplicity, we discuss the cases of both Feldman and Hickey in terms of their requests for permission to sit for the District of Columbia bar examination, it should be recalled that Feldman's petition to the Court of Appeals sought waiver of the educational requirements for purposes of reciprocity admission as well. See text *supra* at notes 40-53. Subsection (c) of Rule 46I at that time provided for admission of members of state bars without the five-year practice requirement that is not ordinarily mandatory. Compare D.C. App. R. 46I(c) (1975) with D.C. App. R. 46I(c) (1978). We view both branches of Feldman's petition in the same light, and the considerations we elaborate are equally applicable to each. As with respect to the bar examination prerequisite, the pivotal factors are first that Feldman avowed no claim of right or entitlement to bar admission under the reciprocity provision, and second that, acknowledging the rule's applicability to him, he sought waiver of the educational requirement rather than an adjudication of his admissibility to the bar. While ordinarily bar admission ventures result in judicial proceedings, see note 200 *infra*, and while the end result of Feldman's waiver request if successful would have

to discern in the letter any desire that the court consider Feldman's legal criticisms of the rule on their merits, or hand down a decision dealing with them.[183] The letter made unmistakably clear that these criticisms would be litigated, if at all, in the District Court;[184] and surely for the antitrust problems highlighted in the letter there was no alternative, since exclusive jurisdiction to consider them is vested in the federal courts.[185]

Hence, we would encounter no difficulty even were we to credit appellees' contention that the letter, in purpose and practical effect, advanced new arguments in aid of Feldman's earlier petition for the waiver. It would seem unreasonable, and indeed counterproductive, to hold that those situated comparably to appellants could never point out what they believe to be legal flaws in bar-admission rules from which they seek waivers on grounds of policy. On the contrary, it is in keeping with the respect and

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been reciprocity admission, his petition, fairly read, was a supplication for a discretionary dispensation rather than a legal demand for admission.

[183] The letter plainly identified its objective:

> As we understand it, . . . the Committee on Admissions has advised Mr. Feldman that Rule 46I bars him from even taking the D.C. bar examination because he is not a graduate of an A.B.A. accredited law school. . . . Under Section 11-2501 of the District of Columbia Code, the Court has plenary power to regulate the licensing of attorneys in the District. This power plainly includes the discretion to waive the requirements of Rule 46 in a deserving case. Clearly, Mr. Feldman's unusually high qualifications for admission provide an ideal occasion for the exercise of such discretion.

Letter, Robert M. Sussman to Hon. Theodore R. Newman, Jr., *supra* note 44, at 3, F. App. 25. See *Feldman Petition*, *supra* note 42, at 5, F. App. 21.

[184] *Id.* at 7, F. App. 29.

[185] See notes 60-61 *infra* and accompaning text.

deference due the judiciary that would-be litigants be encouraged to take all problems concerning bar admission first to the courts having responsibility for that function.[186] This is perhaps even more desirable when a regulation affecting membership in a state or local bar threatens to precipitate a lawsuit in a federal court.

Nor do we see any reason why a party seeking merely an exemption from a court-imposed rule of that kind need bifurcate policy and legal arguments helpful to his request therefrom. It has been settled since *Prentis* that one vieing for a tribunal's nonjudicial resolution of a matter may assert his full views thereon without transforming the nature of the proceeding from nonjudicial to judicial.[187] *Prentis* teaches that nonjudicial action—even of a court—"would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way

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[186] In *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the Court made plain that at least in the abstention context, when a litigant goes into a state court for an authoritative ruling on the applicability of a state regulation in his case, he is not barred from thereafter raising his constitutional objections in a federal court, *even though he has already raised them in the state court*, when he did so before the state tribunal only "so that the statute may be construed 'in light of' those claims." *Id.* at 420, 84 S.Ct. at 467, 11 L.Ed.2d at 448, citing Note, *Consequences of Abstention by a Federal Court*, 73 Harv. L. Rev. 1358, 1364-1365 (1960). On the contrary, the Court, citing *Government & Civic Employees Organizing Comm.* v. *Windsor*, 353 U.S. 364, 366, 77 S.Ct. 838, 839, 1 L.Ed.2d 894, 896 (1957), held that the state court *must* be informed of those claims and given the opportunity to construe the state provision in their light before the federal court will pass on them. 375 U.S. at 419-422, 84 S.Ct. at 467, 11 L.Ed.2d at 447-448.

[187] See text *supra* at notes 143-144.

that it would deal with them if they arose afterwards in a case properly so called." [188] For, *Prentis* explains, "the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up," [189] and "when the final act is [nonjudicial], the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." [190]

Feldman confined his effort in the Court of Appeals to a request for a waiver—not adjudication of the validity—of the rule requiring legal education in ABA-approved schools, and the court's order did not go beyond the limited scope of that request. The order, we have said, was distinctly nonjudicial in character,[191] and it matters not that the court may have considered—as presumably it did—whatever reflections Feldman's constitutional and antitrust stance cast upon the waiver question.

Thus we view Feldman's petition, even as augmented by his counsel's letter, as solely "one for exemption from the rule, not a challenge of it." [192] The Court of Appeals was not requested to review the decision of any other body—indeed, no other entity had the power to grant an exemption [193]—or to originate a decision of its own. To

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[188] See text *supra* at note 145.

[189] See text *supra* at note 144.

[190] See text *supra* at note 144.

[191] See text *supra* at note 183.

[192] *Ktsanes* v. *Underwood*, *supra* note 171, 552 F.2d at 743.

[193] Both cases at bar differ materially from *Summers* in this respect. While the Illinois bar committee, like its counterpart in the District of Columbia, served the court in an advisory capacity, *In re Summers*, *supra* note 134, 325 U.S. at 567-568, 65 S.Ct. at 1311-1312, 89 L.Ed. at 1801, the former had in-

be sure, Feldman argued vigorously that he should be relieved of the requirement of Rule 46I(b), and predicated part of his reasoning on a perception that the rule was unjust in its application to him and possibly was unlawful. But it made sense to communicate those views for whatever value they had on the matter of waiver, and in any event that sort of communication did not alter the fundamental nature of his endeavor. The vital point is that Feldman did not seek, nor did the court make, any determination respecting the validity of the rule; he merely asked the Court of Appeals to relieve him from it, and expressly reserved his legal claims for possible adjudication on another day in another forum.[194]

Moreover, the proceedings before the Court of Appeals can hardly be said to have cast the constitutional and antitrust questions in "such a form that the judicial power [was] capable of acting on [these issues]." [195] Appellants, we repeat, did not challenge the validity of the

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dependent authority that the latter lacked. The Illinois committee was empowered to deny certificates of fitness, and in fact it denied one to Summers on grounds he challenged as unconstitutional. *Id.* at 569 n.10, 65 S.Ct. at 1312 n.10, 89 L.Ed. at 1801-1802 n.10. The proceeding in the Illinois high court was thus a review of the committee's action resulting in a decision on the merits. *Id.* at 567-568, 65 S.Ct. at 1311-1312, 89 L.Ed. at 1801. The District of Columbia Committee, on the other hand, had no authority to act on appellants' requests save by recommendation to the Court of Appeals, and it did not purport to do otherwise; rather, the action complained of was in each instance the court's own. Thus, in these cases, unlike *Summers*, we do not have a situation wherein "relief is . . . sought in a [nonfederal] court against the action of a committee, appointed to advise the court." *Id.*

[194] Letter, Robert M. Sussman to Hon. Theodore R. Newman, Jr., *supra* note 44, at 7, F. App. 29.

[195] See *In re Summers*, *supra* note 134, 325 U.S. at 566-567, 65 S.Ct. at 1311, 89 L.Ed. at 1800. See text *supra* at note 161.

rule, but, as in *Ktsanes*, "ask[ed] for ministerial action, not judicial determination." [196] We thus conclude congruently with *Ktsanes* that "[t]he denial of [their] petition[s] was made by the court acting in an administrative capacity," [197] for the court was not in position to act in any other way. And we further agree that "that denial did not present a case or controversy cognizable by an Article III court and, thus, was not appealable to the Supreme Court of the United States." [198]

In sum, our analysis of these cases in light of the relevant precedent constrains us to hold that in each

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[196] *Ktsanes* v. *Underwood*, *supra* note 171, 552 F.2d at 743.

[197] *Id.*

[198] *Id.* We note that in each of the major bar admission cases in which the Supreme Court has discussed its jurisdiction, the constitutional issues considered had been raised and argued below. *In re Summers*, *supra* note 134, came to the Court only after the petitioner had sought to have the Illinois Supreme Court overturn the decision of a committee of the state bar on constitutional grounds. Similarly, in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d 810 (1957), the Court expressly noted that it was granting certiorari because the petitioner had repeatedly asserted his constitutional claims throughout his hearings before the state's committee of bar examiners and had stated them again in his petition for review before the California Supreme Court. See also *In re Griffiths*, 413 U.S. 717, 718, 93 S.Ct. 2851, 2853, 37 L.Ed.2d 910, 913 (1973) (litigation on constitutional issue began in state trial court and proceeded to state supreme court); *Law Students Civil Rights Research Council* v. *Wadmond*, *supra* note 179, 401 U.S. at 158 n.9, 91 S.Ct. at 724 n.9, 27 L.Ed.2d at 755-756 n.9 (noting that three-judge district court was properly convened to hear constitutional challenge to state bar-admission requirement, and pointing out, without stating its opinion on the matter, that three-judge court held that "the courts and the justices were acting in an administrative capacity"); *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 5, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971) (plurality opinion) (Arizona court denied petition

instance the prior proceedings before the Court of Appeals were of a nonjudicial character, and therefore did not produce in either a judgment reviewable by the Supreme Court.[199] It follows that appellants' suits in the District Court were jurisdictionally appropriate for consideration and disposition of their constitutional claims.[200]

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for and order that state bar committee show cause why admission should not be granted despite applicant's refusal to answer question concerning prior contact with organizations advocating government's overthrow); *Willner* v. *Committee on Character and Fitness, supra* note 165, 373 U.S. at 102, 83 S.Ct. at 1179, 10 L.Ed.2d at 228-229 (constitutional questions were briefed and argued before state court). Other cases dealing with bar admission have not made clear whether the constitutional issues were argued in the state court, but they also have not discussed the jurisdictional questions at all.

[199] To the extent relevant here, the doctrine of judicial immunity from suit for damages buttresses our holding. In that context, the Court recently declared that "the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself . . . and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump* v. *Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331, 342 (1978). We have held that appellants did not seek or subject themselves to judicial action by the Court of Appeals, and their expectations of purely nonjudicial rulings by the court militate in favor of federal jurisdiction of their lawsuits.

[200] The decisions upon which appellees chiefly rely are readily distinguishable. Cases precipitated by disciplinary proceedings against lawyers, *e.g.*, *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977); *Jones* v. *Hulse*, 391 F.2d 198 (8th Cir.), *cert. denied*, 393 U.S. 889, 89 S.Ct. 206, 21 L.Ed.2d 167 (1968), are inapposite because the proceedings challenged therein culminated in adjudications on the right to engage in law practice. *Randall* v. *Brigham*, 74 U.S. (7 Wall.) 523, 535, 19 L.Ed. 285, 293 (1869) (judge disbarring attorney acts judicially, and thus is immune to resulting damage suit); *Ex parte Secombe, supra* note 122, 60 U.S. (19 How.) at 15, 15 L.Ed. at 566 (decision to disbar is "in its nature a judicial act"); *Erdmann* v. *Stevens*, 458

IV. THE RES JUDICATA CLAIMS

Because we find that the District Court had jurisdiction over the subject matter of these lawsuits, we must

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F.2d 1205, 1208 (2d Cir. 1972) (state court's "conduct of disciplinary proceedings with respect to those admitted to practice before it amounts to a judicial inquiry"); *Saier* v. *State Bar of Michigan*, 293 F.2d 756, 760 (6th Cir.), *cert. denied*, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961) ("[i]n the final analysis, it is a judicial function to pass on the disbarment of a lawyer"); *Mildner* v. *Gulotta*, 405 F. Supp. 182 (E.D. N.Y. 1975) (three-judge court), *aff'd*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976) ("we must view disciplinary proceedings as *judicial* rather than *administrative* in nature") (emphasis supplied). See also *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225-1226, 20 L.Ed.2d 117, 121-122 (1968); *Charlton* v. *FTC*, 177 U.S.App.D.C. 418, 421, 543 F.2d 903, 906 (1976). We detect no element of judiciality in the disposition of appellants' entreaties for dispensation of Rule 46I(b), not on legal grounds but wholly as a matter of administrative grace.

Nor does *Doe* v. *Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977) aid the position espoused by appellees. Doe twice sought and obtained rulings—albeit adverse—by the Supreme Court of Colorado on his application for admission to the bar, *id.* at 596-597, and thereafter initiated litigation that was, "in essence, an attempt by Doe to seek review in inferior federal courts of the *entire* state proceedings, including the order of the Colorado Supreme Court refusing to grant his second application for admission." *Id.* at 599 (emphasis in original). We are in full agreement with the observation that "[t]he action of the Colorado court was judicial rather than administrative," *id.* at 604 (Breitenstein, J., concurring in result), a characterization the Court of Appeals' action in the present cases does not fit. Moreover, neither Feldman nor Hickey now seek review of the waiver proceedings in the Court of Appeals, or the court's decision on waiver. See note 24 *supra*. Instead, each challenges on antitrust and constitutional grounds the administration of Rule 64I(b) and the validity of the rule itself. These cases thus differ from *Brown* v. *Board of Bar Examiners of the State of Nevada*, 623 F.2d 605 (9th Cir. 1980), which held the district court to be with-

reach appellees' alternative argument that, in the case of appellant Feldman, consideration of the legal issues that he sought to raise in the District Court was barred by principles of res judicata.[201] We reject this contention.

Stripped to its essence, appellees' position is that the letter from Feldman's counsel to the Court of Appeals[202] incorporated the same questions of law that arose in his action in the District Court; that these questions had already been finally decided by the Court of Appeals; and that therefore they could not be relitigated in Feldman's lawsuit.[203] Undeniably, the doctrine of res judicata

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out jurisdiction to entertain a challenge to a state court's decision not to waive a rule similar to the rule at issue in the instant case. Although acknowledging that "federal district courts may assert jurisdiction . . . to ensure that generally applicable rules or procedures do not impinge on constitutionally protected rights," *id.* at 609, the Ninth Circuit ruled that there is no jurisdiction to hear a lawsuit based on the theory that the state court had arbitrarily and capriciously refused to waive the rule. *Id.* at 609-610. We do not reach that question in this case.

[201] Brief for Appellees in No. 78-2235 at 54-61. It is of course well established that a decision under review will be affirmed if it is correct even though "the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224, 230 (1937). See *Brown* v. *Allen*, 344 U.S. 443, 459, 73 S.Ct. 397, 408, 97 L.Ed. 469, 490 (1953); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626, 633 (1943); *International Union, UAW* v. *National Right to Work Legal Defense & Educ. Foundation, Inc.*, 192 U.S.App.D.C. 23, 35, 590 F.2d 1139, 1151 (1978).

[202] See text *supra* at notes 44-45.

[203] Because we uphold the antitrust dismissals, we have no occasion to address the more difficult question whether the fact that federal district courts have exclusive jurisdiction over Sherman Act claims means that a state court's decision in a suit under the Act cannot be res judicata in a subsequent action in the proper federal forum. *Cf. DeWitt Motor Co.* v. *Chrysler Motors Corp.*, 391 F.2d 912 (6th Cir. 1968) (no res

prohibits a state court litigant defeated in a judicial proceeding from seeking an encore in a federal forum.[204] But the attempt to apply the doctrine of res judicata to Feldman's case proceeds from a faulty premise; it assumes that the Court of Appeals' action in denying his waiver request was judicial in character, and that proposition we have already rejected.[205] As the Supreme Court noted in *Prentis*, "[t]he decision upon [nonjudicial questions] cannot be res judicata when a suit is brought. . . . And it does not matter what inquiries may have been made as a preliminary to the [nonjudicial] act."[206] Since we hold that the proceeding in the Court of Appeals was nonjudicial in nature, its outcome cannot be res judicata in a subsequent judicial action.[207] Accordingly, we cannot sustain the dismissal of Feldman's suit on this alternative ground.

V. SUMMARY

Lest our decision be interpreted too broadly, we pause to summarize precisely what we have said. In these cases, appellants petitioned the District of Columbia Court of Appeals only to waive on their behalf one of its requirements for admission to the bar. They did not seek review by the Court of Appeals of the decision of any other body or individual; they did not request

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judicata); *Cream Top Creamery* v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1968) (same).

[204] *Angel* v. *Bullington*, 330 U.S. 183, 190-191, 67 S.Ct. 657, 661, 91 L.Ed. 832, 837-838 (1947); see *Cromwell* v. *County of Sac*, 94 U.S. (4 Otto) 351, 24 L.Ed. 195 (1877); *Reiter* v. *Universal Marion Corp.*, 112 U.S.App.D.C. 68, 299 F.2d 449 (1962).

[205] See text *supra* at notes 199-200.

[206] *Prentis* v. *Atlantic Coast Line Corp.*, *supra* note 135, 211 U.S. at 227, 29 S.Ct. at 69, 53 L.Ed. at 159.

[207] See *id.*

the court to invalidate any rule; nor did they ask for anything as a matter of right. Consequently, the orders of the Court of Appeals denying the petitions were administrative, not judicial, in nature. In this milieu, given that appellants' constitutional claims are not insubstantial, the District Court had jurisdiction over the subject matter of both actions, and the doctrine of res judicata interposes no bar to the continued prosecution of either. Of course, we intimate no view on the ultimate disposition of these issues on the merits. Appellants' antitrust contentions, however, are without merit and were properly dismissed.

The judgments appealed from are reversed, and the cases are remanded for further proceedings consistent with this opinion.

So ordered.

ROBB, *Circuit Judge, concurring in part, dissenting in part*:

I.

I agree that the antitrust claims must be dismissed. They are frivolous. The Supreme Court has held that the antitrust statutes do not apply to a restraint imposed by the state acting as sovereign. *Parker v. Brown*, 317 U.S. 341, 352 (1943); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977). In this case the District of Columbia Court of Appeals acting *en banc* entered orders denying Hickey's and Feldman's petitions to waive provisions of the court's rules. (Hickey J.A. 35; Feldman J.A. 33) Any restraint imposed by the rules was therefore compelled by direction of the state. I am not impressed by the appellants' argument that the Court of Appeals has simply adopted rules recommended by the American Bar Association and thus authorized the Bar Association's competitive activity. The rules are those of the court, and they are enforced by the court, not by the Bar Association. That the court has adopted a standard of the Bar Association as a convenient measure of an applicant's qualifications does not mean that the court has abdicated its authority in favor of the Bar Association.

II.

In my opinion the District Court had no jurisdiction to review the order of the District of Columbia Court of Appeals.

The District of Columbia Code Title 11, § 102 provides:

> The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code. (July 29, 1970, Pub. L. 91-358 § 111, title I, 84 Stat. 475)

The Court of Appeals thus has the status of a state supreme court. *Key v. Doyle*, 434 U.S. 59, 64 (1977). The adverse decisions in the appellants' cases were reviewable in the Supreme Court of the United States. Although the appellants cast their petitions to the Court of Appeals in terms of requests for waivers, the petitions in essence were demands that the court declare the petitioners qualified to sit for the bar examination. Those demands were denied by *en banc* orders of the Court of Appeals. The denials were judicial acts and as such were reviewable on writ of certiorari to the Supreme Court. They were not reviewable in the District Court. *In Re Summers*, 325 U.S. 561, 568-69 (1945); *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 125 (7th Cir. 1977); *Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); *Mackay v. Nesbett*, 285 F. Supp. 498, 502 (D. Alas. 1968); *aff'd*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

In the *Summers* case the Supreme Court held, 325 U.S. 568-69:

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court. [Footnote omitted]

I can see no difference in principle, so far as review in the Supreme Court is concerned, between denial of a claim of present right to admission to the bar, on the one hand, and denial of a claim that the appellants are presently qualified to take the bar examination.

III.

By the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, Congress established " 'a Federal-State court system in the District of Columbia analagous to court systems in the several States.' " H.R. Rep. No. 91-907, p. 35 (1970), *quoted in Key v. Doyle, supra* at 64. As part of this scheme Congress provided, 84 Stat. 521, D.C. Code § 11-2501(a):

> The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.

The decision of the majority sanctions an intrusion by the federal courts into what Congress plainly intended to be the prerogative of the District of Columbia court. I think this is unfortunate. It is especially unfortunate in cases such as these in which candidates for admission to the bar are challenging the judgment of the District of Columbia Court of Appeals that they are not qualified to take the bar examination. In my opinion that kind of controversy should not be the business of the United States District Court.[1]

I would affirm both judgments.

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[1] Although I think we should not reach the merits of the plaintiffs' claims, it may be noted that the requirement of graduation from an ABA approved law school as a prerequisite to admission to the bar has been adopted in 33 states and the District of Columbia and has been uniformly upheld against legal challenge. *See* Brown v. Bd. of Bar Examiners, 623 F.2d 605 (9th Cir. 1980); Lombardi v. Tauro, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973); Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966); Louis v. Supreme Court of Nevada, 490 F. Supp. 1174 (D. Nev. 1980); Moore v. Supreme Court of South Carolina, 447 F. Supp. 527, *aff'd*, 577 F.2d 735 (4th Cir.),

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cert. denied, 439 U.S. 984 (1978); Ostroff v. New Jersey Supreme Court, 415 F. Supp. 326 (D. N.J. 1976); Potter v. New Jersey Supreme Court, 403 F. Supp. 1036 (D. N.J. 1975); Application of Urie, 617 P.2d 505 (S.Ct. Alaska 1980); In re Stephenson, 511 P.2d 136 (S.Ct. Alaska 1973); Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211 (1933); Hansen v. Minnesota Bd. of Bar Examiners, —— Minn. ——, 275 N.W.2d 790 (1978), *appeal dismissed for want of substantial federal question*, 441 U.S. 938 (1979); Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942); Petition of Batten, 83 Nev. 265, 428 P.2d 195 (1967); In re Lorring's Petition, 75 Nev. 330, 340 P.2d 589 (1959); Henington v. State Bd. of Bar Examiners, 60 N.M. 393, 291 P.2d 1108 (1956); Murphy v. Pennsylvania State Bd. of Bar Examiners, 482 Pa. 43, 393 A.2d 369 (1978), *cert. denied*, 440 U.S. 901 (1979); Application of Schatz, 80 Wash. 2d 604, 497 P.2d 153 (1972).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Actions Nos. 78-0957 and 78-1276

No. 78-2235

MARC FELDMAN, APPELLANT

v.

WILLIAM C. GARDNER, *et al.*

No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Before: ROBINSON, Chief Judge, and Davis, Judge.*

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Chief Judge Robinson in the above entitled cases on July 23, 1981 be, and it hereby is, amended as follows:

Page 18, line 18,—strike "prodigy" and insert in lieu thereof the word "progeny"

Per Curiam
For the Court

GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Actions Nos. 78-0957 and 78-1276

No. 78-2235

MARC FELDMAN, APPELLANT

v.

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No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Before: ROBINSON, *Chief Judge,* and DAVIS, *Judge.**

ORDER

It is ORDERED, by the Court, *sua sponte,* that the opinion for the Court filed herein on July 2 1981, be and hereby is amended as follows:

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* Of the United States Court of Claims, sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

1. On page 48, present footnote 197 is deleted and the following is substituted:

> [197] *Id.* On this basis, we distinguish *Dasher* v. *Supreme Court of Texas,* 650 F.2d 711 (1981). There a graduate of an unapproved law school moved for leave to file in that court a petition for an exemption to the court's bar-admission rules, characterizing the petition as "an original proceeding within the exclusive jurisdiction of the Supreme Court [of Texas]" and asking that the petition "be filed and that the cause be placed upon the docket, and that the petition be acted upon by the Court." *Id.* at 713. This request was actively opposed, thus giving the proceeding an adversary quality; and the court placed the petition on its docket and subsequently denied it on the merits. *Id.* In this fashion the court disposed, not of a mere solicitation of an equitable waiver, but of a positive demand for legal relief; the petitioner "claim[ed] that she was, as of that time, entitled to be admitted to the bar examination and that she had, even as of that time, a right to be admitted to the practice of law on the same terms and conditions as other applicants if she passed the examination." *Id.* at 715. Indeed, the Fifth Circuit itself found, as a ground for differentiation, that while in *Ktsanes* "the Illinois Supreme Court had acted in an administrative capacity rather than a judicial one," in *Dasher* "[t]he Texas Supreme Court proceedings bore the form as well as the substance of judicial proceedings." *Id.* at 717. We think *Dasher* and the case at bar mark the same disparity.

2. On page 48, line 1 of footnote 198, *"Id."* is deleted and the following is substituted:

> *Ktsanes* v. *Underwood, supra* note 171, 552 F.2d at 743.

Per Curiam
For the Court

GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

Filed Oct. 24, 1978
James F. Davey, Clerk

MARC FELDMAN,

Plaintiff,

v.

WILLIAM C. GARDNER, CHAIRMAN, COMMITTEE ON ADMISSIONS DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

ORDER

Upon consideration of defendants' motion to dismiss, plaintiff's opposition and defendant's reply thereto, and the Court having concluded that it lacks jurisdiction over the subject matter of this lawsuit, it is by the Court this 24th day of October, 1978,

ORDERED that defendants' motion to dismiss is hereby granted and plaintiff's complaint is hereby dismissed.

/s/ JUNE L. GREEN
June L. Green
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

MARC FELDMAN,

Plaintiff,

v.

WILLIAM C. GARDNER, CHAIRMAN, COMMITTEE ON ADMISSIONS DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

MEMORANDUM OPINION

Introduction

Plaintiff, Marc Feldman, instituted this action challenging the refusal of the D.C. Court of Appeals to waive its rules prescribing educational requirements for applicants to the bar on his behalf. Mr. Feldman, an attorney who has passed the Maryland and Virginia bars, did not attend law school but acquired legal training by working as an apprentice with a Virginia law firm, formally auditing courses at the University of Virginia, and clerking for the Honorable William Bryant, now Chief Judge of the District Court for the District of Columbia. He seeks a declaratory judgment that Rule 46 of the General Rules of the D.C. Court of Appeals, which provide that an applicant must be a graduate of a law school accredited by the American Bar Association, either on its face or as applied to plaintiff violates the Fifth Amendment of the Constitution, the Civil Rights Act (42 U.S.C. §§ 1981 *et seq.*), and the Sherman Act (15 U.S.C. §§ 1, 2). Plaintiff seeks an injunction requiring (i) that he be admitted to the bar forthwith without examination, or (ii) that he be permitted to sit for the bar examination or (iii) that the D.C. Court of Appeals and the

Committee on Admissions make an ad hoc determination whether his qualifications are equivalent to those applicants who have met the prescribed educational requirements.

On July 14, 1978, the defendants filed a motion to dismiss, based on lack of subject matter jurisdiction and res judicata. Upon consideration of defendant's motion, plaintiff's opposition and defendant's response thereto, the Court grants defendant's motion, and, as grounds therefor finds that this Court lacks jurisdiction over the subject matter of this lawsuit.

Discussion

The parties have recognized that the existence of subject matter jurisdiction turns on whether the order of the D.C. Court of Appeals denying plaintiff's petition for a waiver of Rule 46 represented a judicial determination which should have been appealed to the Supreme Court of the United States.

The Supreme Court in *In Re Summers,* 325 U.S. 561 (1945) clearly enunciated the standards to be applied in determining whether an action by a state's highest court is taken in response to an Article III case or controversy before that court.

> A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' [citations omitted] . . . A declaration on rights as they stand must be sought . . . and there must be an actual controversy over an issue. 325 U.S. at 566, 567.

The Court in *Summers* by applying these standards found that the action of the Illinois Supreme Court denying petitioner's application for admission to the bar was judicial and thus appealable to the Supreme Court. Although the Illinois Supreme Court asserted that its actions with respect to petitioner's application were ministerial, the Supreme Court in rejecting that argument stated:

> The form of the proceeding is not significant. It is the nature and effect which is controlling. *Id* at 567.

This Court, bound by *Summers* standards, must examine the facts and arguments that were presented to the D.C. Court of Appeals to determine if a case or controversy had developed to the extent that "the judicial power was capable of acting on it."

Plaintiff first applied for admission to the D.C. bar in November 1976. In January 1977 the Committee on Admissions advised him that his application was not acceptable because it was not accompanied by proof that he had graduated from an accredited law school as required by Rule 46. Subsequently plaintiff sought and was granted a hearing by the Committee on Admissions, where he presented his qualifications and responded to questions from committee members. In May 1977 the Committee rejected plaintiff's application on the same basis. In June 1977 plaintiff petitioned the D.C. Court of Appeals for admission to the D.C. bar and in March 1978 plaintiff's counsel wrote to the Court to urge them to either waive Rule 46 or allow him to sit for the July 1978 bar. On March 30, 1978 the Court *en banc* issued a per curiam order denying plaintiff's petition.

Plaintiff now argues that the March 1978 order merely reflects an administrative act by the D.C. Court of Appeals denying him an exemption from the rule. If this were the case then plaintiff would be on fairly strong jurisdictional footing because, as the Tenth Circuit[1] has indicated:

> . . . there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court. The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds that the state has unlaw-

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1 *Doe v. Pringle* 550 F.2d 536 (10th Cir. 1976).

> fully denied a particular applicant admission. The [District] Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority on the administration of the rules [citations omitted] *such is not true where review of a state court's adjudication of a particular application is sought.* 550 F.2d at 597.

See also *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 1969), aff'd. 401 U.S. 154 (1971); *Lipman v. Van Zant* 329 F. Supp. 391 (N.D. Miss. 1971); *Keenan v. Board of Law Examiners* 317 F. Supp. 1350 (E.D.N.C. 1970).

The Court finds that in the instant case, plaintiff did more than seek a Rule 46 waiver, which might otherwise have allowed him to invoke federal court jurisdiction, he in fact raised constitutional and statutory issues before the D.C. Court of Appeals. In a lengthy letter submitted by counsel, plaintiff challenged the validity of Rule 46 on its face and as applied, alleging violations of due process, equal protection and antitrust law.[2]

Therefore, in contrast to plaintiff's assertions that the D.C. Court of Appeals acted only in an administrative capacity in denying his petition, this Court finds that their *en banc* decision was a judicial order which fully encompassed the constitutional and statutory issues raised. If this Court were to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court. Congress explicitly denied such a position to this Court when it enacted the Court

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2 Plaintiff's arguments with respect to the due process and antitrust law violations were supported by citation to relevant case law. The equal protection argument was based on the Court's alleged arbitrary refusal to waive Rule 46 for plaintiff, while granting such waivers, until recently, for graduates of a local unaccredited law school.

Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970) and exclusively empowered the D.C. Court of Appeals with authority to prescribe rules for admission to the D.C. bar. As the Ninth Circuit noted in *MacKay v. Nesbitt,* 412 F.2d 846 (1969), *cert. denied,* 396 U.S. 960 (1969):

> . . . [T]he rule that orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court on certiorari to the state court, . . . serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars and between the state and federal judicial systems. We are persuaded that it is sound. 412 F.2d at 846.

Accordingly this Court concludes that this case must be dismissed. An appropriate order is entered herewith.

/s/ JUNE L. GREEN
June L. Green
United States District Judge

Date: Oct. 24, 1978

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

Filed
Dec. 21, 1978
James F. Davey,
Clerk

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

MEMORANDUM ORDER

This is an action to compel plaintiff's admission to the District of Columbia Bar examination notwithstanding his failure to comply with Rule 46(I) (b) (3) of the Rules of the District of Columbia Court of Appeals, which requires graduation from an American Bar Association (ABA) accredited law school, and to declare that Rule unconstitutional.

Plaintiff is a 46-year old Maryland citizen and a graduate of the Potomac School of Law, which has not been accredited by the ABA. On April 18, 1978, plaintiff petitioned the District of Columbia Court of Appeals for a waiver of Rule 46(I) (b) (3) in his case. On June 12, 1978, the Court denied the petition by an *en banc* order.[1] Plaintiff did not appeal that order. Instead, on July 10, 1978, he filed the instant complaint seeking a declaratory judgment that defendants' refusal to allow him to sit for the examination violates both the Fifth Amendment to the Constitution and the federal antitrust laws, and an injunction ordering defendants to allow plaintiff to take the examina-

1 The Court noted that if plaintiff were to complete 24 credit hours as a non-degree candidate in an approved law school, he would be eligible to sit for the examination.

tion. On July 21, 1978, this Court denied plaintiff's application for a preliminary injunction relating to the District of Columbia Bar examination administered on July 26 and 27, 1978. Presently before the Court is the motion of defendants to dismiss the complaint for lack of subject matter jursidiction.

It is well settled that the admission and exclusion of attorneys by the members of the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court. *In re Summers,* 325 U.S. 561 (1945); *Ex parte Garland,* 71 U.S. 333, 378-79 (1866); *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977); *McKay* v. *Nesbett,* 412 F.2d 846 (9th Cir. 1969); *Jones* v. *Hulse,* 391 F.2d 198 (8th Cir. 1968); *Feldman* v. *Gardner,* C.A. No. 78-0957 (D.D.C. Oct. 24, 1978). Plaintiff's argument that this case is properly before this Court as a broad constitutional attack on defendants' "rulemaking authority or the administration of the rules," as distinguished from a "review of a state court's adjudication of a particular application" (*Doe* v. *Pringle, supra,* 550 F.2d at 597), must fail.

However the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of defendants' denial of his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case. In view of that circumstance, there is no basis for the extraordinary attempt to invoke the jurisdiction of this Court on a matter entrusted by the Congress to the D.C. Court of Appeals.

It is also clear that, had plaintiff raised the issues concerning the validity of Rule 46 before the D.C. Court of Appeals in the context of the proceeding he brought there, that court could and would have entertained and determined them. *Harper* v. *District of Columbia Committee on Admissions,* 375 A.2d 25

(D.C. 1977). Had that course been followed, this Court would have been precluded in any event from thereafter entertaining those same issues. *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122 (7th Cir. 1977). This Court has been informed through counsel for defendants that the D.C. Court of Appeals is still willing to consider those matters at this juncture. It would be a violation of the principles of comity and judicial economy in these circumstances for this Court to exercise jurisdiction even if such jurisdiction exists.

Plaintiff's second claim—that defendants' action violated the antitrust laws—must likewise be dismissed, for the antitrust laws do not apply to the kind of action being challenged. *Parker* v. *Brown,* 317 U.S. 341 (1943); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

Accordingly, it is this 21st day of December, 1978,

ORDERED That defendants' motion to dismiss for lack of jurisdiction be and it is hereby granted, and it is further

ORDERED That the instant complaint be and it is hereby dismissed.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

December 21, 1978

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Actions Nos. 78-0957 and 78-1276

No. 78-2235

MARC FELDMAN, APPELLANT

v.

WILLIAM C. GARDNER, *et al.*

No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Appeals From the United States District Court
for the District of Columbia

Before: ROBINSON, Chief Judge, ROBB, Circuit Judge and DAVIS, Judge.*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is:

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* Of the United States Court of Claims, sitting by designation pursuant to 28 U.S.C. § 293(a).

ORDERED AND ADJUDGED by this Court, that the judgments of the District Court appealed from herein are hereby reversed and the cases are remanded to the District Court for further proceedings, consistent with the Opinion of this Court filed herein this date.

Per Curiam
For the Court

GEORGE A. FISHER
George A. Fisher
Clerk

Date: July 23, 1981

Opinion for the Court filed by Chief Judge Robinson

Opinion concurring in part and dissenting in part filed by Circuit Judge Robb

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Actions Nos. 78-0957 and 78-1276

Filed Oct. 27, 1981
George A. Fisher,
Clerk

No. 78-2235

MARC FELDMAN, APPELLANT

v.

WILLIAM C. GARDNER, *et al.*

No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Before: ROBINSON, Chief Judge, ROBB, Circuit Judge and OSCAR H. DAVIS,* Judge, United States Court of Claims

ORDER

On consideration of the petitions for rehearing filed by petitioners and appellees, it is

---

* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

For the Court:
George A. Fisher, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Actions Nos. 78-0957 and 78-1276

Filed Oct. 27, 1981
George A. Fisher,
Clerk

No. 78-2235

MARC FELDMAN, APPELLANT

v.

WILLIAM C. GARDNER, *et al.*

No. 79-1233

EDWARD J. HICKEY, JR., APPELLANT

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, Circuit Judges

ORDER

The suggestions for rehearing *en banc* filed by petitioners and appellees have been circulated to the full Court. A majority of the members of the Court have not voted in favor of the suggestions. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

For the Court:
George A. Fisher, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges MacKinnon, Robb and Ginsburg would grant appellees' suggestions.

Circuit Judge MacKinnon would grant the suggestion of petitioners.

Circuit Judges Wright and Wald did not participate in the foregoing order.

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED MAR 30 1978

District of Columbia
Court of Appeals Alexander L. Stevas Clerk

No. JANUARY TERM, 1978

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

ORDER

On consideration of the petition of Marc Feldman to waive the provisions of Rule 46 of the General Rules of this Court, it is

ORDERED that applicant's petition is denied.

PER CURIAM.

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia
Court of Appeals

FILED JUN 12 1978

Clerk

No. JANUARY TERM, 19

IN RE
EDWARD J. HICKEY, JR.

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

ORDER

The Court has considered the special petition for a waiver of the Court's rules and petitioner's representation therein that "[O]n information and belief, petitioner avers that the ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement."

The American Bar Association Standards and Rules of Procedure, as amended - 1977, permit enrollment of persons in petitioner's category under Standard 506(ii) if they can satisfy the requirement for admission set forth in Standard 502. Accordingly, it is

ORDERED that petitioner's petition is denied.

PER CURIAM.

Copies to:

Edward J. Hickey, Jr.

Fred F. Fielding, Esquire
Wayne M. Lee, Esquire
1800 M Street NW, 20036

Joint Appendix

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Petitioners,

—v.—

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Counsel for Respondents

Petition for Certiorari filed January 13, 1982.
Certiorari granted June 28, 1982.

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Opinion of the U.S. Court of Appeals for the District of Columbia Circuit (July 23, 1981, as amended September 28 and October 27, 1981)*

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* The opinion of the U.S. Court of Appeals is reported at 661 F.2d 1295 and also is printed in the appendix to the petition for certiorari previously filed in this proceeding. In accordance with Rule 30.1 of the Court's rules, it has not been printed again in this appendix.

DISTRICT OF COLUMBIA

COURT OF APPEALS

Petition of Marc Feldman for Admission to the Bar of the District of Columbia Without Examination

Marc Feldman, a member of the Bar of the Supreme Court of Virginia, does hereby respectfully petition for admission to the Bar of the District of Columbia without examination. Petitioner contends that he possesses the requisite fitness and good moral character necessary to practice law in this jurisdiction. In support of this petition, it is submitted that:

1) After completing a statutorily prescribed three year program of legal education, petitioner sat for the Virginia Bar Examination in February, 1976. He was a successful candidate and was duly admitted to the Virginia State Bar on April 30, 1976 and to the Bar of the Supreme Court of Virginia on June 11, 1976.

2) Petitioner began his program of law study, prescribed by Section 54-62(2) of the Code of Virginia, 1950, as amended, on October 20, 1972. This program of law office study or apprenticeship is a complete alternative to attendance at a law school approved by the American Bar Association. It is authorized by the statutes of Virginia for the purpose of meeting all legal education requirements in order to take the Virginia Bar Examination. Copies of the pertinent section of the Virginia Code and the Rules of the Virginia Bar Examiners for this independent study program accompany the petition as Exhibit A.

3) Petitioner chose this alternative method of legal education, rather than attendance at an A.B.A. approved law school, because of his belief that substantive learning in a clinical context would best prepare him to be a practicing attorney. It was not the case that he elected this program after being denied admission to law school. In fact, petitioner has

never submitted an application for admission to any law school.

4) During his three year apprenticeship, petitioner worked and studied in a variety of legal environments. For two and one half years, petitioner spent over 55 hours per week in law office study of twenty-four subject areas with the firm of Lowe and Gordon in Charlottesville, Virginia. (The subject areas are enumerated in Exhibit A.) Petitioner's responsibilities included a broad range of legal duties: investigation, research, meeting with clients, writing and drafting, trial preparation, case management, and appellate litigation. To complement his clinical program, petitioner formally audited courses at the University of Virginia Law School in theoretical subjects and subject areas in which he believed law firm work inadequate to provide meaningful exposure.

5) For the final six months of the three year apprenticeship, May to October 1975, petitioner served as a clerk for the Honorable William B. Bryant, Chief Judge of the United States District Court for the District of Columbia. He assumed the full range of legal responsibilities associated with clerking for a federal district court judge. Judge Bryant provides his clerks with a broad range of experiences, not only in the areas of research and drafting, but also in managing his sizable caseload. The caseload consisted of standard federal court fare and matters which are unique to the District of Columbia as the seat of government.

6) Petitioner has attended numerous professional programs and seminars throughout the eastern United States during the period of his training and practice. Additionally, he has served as the Reporter for a jointly funded project of the American Bar Association, Virginia State Bar, and Virginia State Department of Corrections. This project conducted a study of Virginia's correctional system and proposed recommendations for improvement in the areas of prison discipline, grievance, and legal services.

7) On March 1, 1976, after sitting for the Virginia Bar Examination, petitioner assumed the position of staff attorney

with the Baltimore Legal Aid Bureau. Petitioner competed for this position with other qualified applicants—all of whom were graduates of A.B.A. approved law schools. The Bureau's choice of petitioner was made with full knowledge of his legal education, and their selection of him recognized the equivalency of his professional preparation. While associated with the Legal Aid Bureau, petitioner maintained an active trial court caseload in addition to staff training, supervision of litigation, and other administrative responsibilities.

8) On November 26, 1976, petitioner forwarded to the Secretary of the Committee on Admissions a completed application, plus accompanying documents and fees, for admission to the District of Columbia Bar. This application for admission was submitted pursuant to Rule 46 of the Rules of the District of Columbia Court of Appeals. The motivation for this application was petitioner's acceptance of a position with a District of Columbia law firm. Secretary Anthony Nigro notified petitioner that his application for admission could not be certified.

> Review of your application indicates that you did not graduate from a law school approved by the American Bar Association; the Court's rules for both admission without examination and by examination require compliance with that provision. Waivers or exceptions to this rule are not authorized.

Letter of January 7, 1977 from Anthony Nigro to Marc Feldman and included as Exhibit B.

9) Subsequent to Mr. Nigro's letter, petitioner corresponded with Mr. Jacob A. Stein, Chairman of the Committee on Admissions for the District of Columbia Court of Appeals. In response to this correspondence, the Committee on Admissions requested that petitioner appear for an informal hearing on May 9, 1977. At this informal hearing, petitioner made a statement in behalf of his application for admission and then responded to questions of the Committee members regarding his background and training. On May 11, 1977, petitioner was

informed that "the Committee concluded that authority to grant exceptions or waivers of the Court's rules rests solely with the Court." A copy of this letter is included as Exhibit C.

10) Petitioner has been recently notified that he was successful on the Maryland Bar Examination given in February of this year. Subject to a favorable character report, he will be recommended to the Court of Appeals of Maryland for admission to the Bar. Petitioner anticipates that he will be licensed to practice in the State of Maryland by the end of June, 1977. While Maryland nas no comparable provision to this jurisdiction's Rule 46 I (c), Rule 5b of the Rules Governing Admission to the Bar of Maryland does provide that no person shall take the bar examination unless he or she has graduated from a law school approved by the American Bar Association (or if located in Maryland approved by the Maryland State Department of Education). Exercising discretion invested by Rule 5c, the Maryland Board of Law Examiners determined that by reason of petitioner's education and experience he was qualified and thus they waived the requirements of section b.

Albeit unusual, petitioner has pursued a serious course of legal education. He has participated in a closely supervised law reading program that has integrated theory and practice. It is his firm belief that his professional education and training is equal to that received by those who have attended an A.B.A. approved law school. Petitioner is already a member of one Bar and will shortly be a member of another Bar in neighboring jurisdictions to the District of Columbia. Motivated by present employment with a District law firm, petitioner puts forward this application in good faith. As such, the objectives of the District of Columbia's procedures and requirements for admission to the Bar will not be frustrated by granting this petition. Yet, the wording of Rule 46 is such as to prohibit him from gaining admission to the Bar of this jurisdiction and thus from practicing the profession for which he has prepared.

Petitioner has unsuccessfully pursued admission before all available avenues short of direct petition to this Court. Petitioner would welcome, and encourages the Court to provide,

the opportunity for personal appearance and presentation of witnesses or submission of letters of recommendation. Appearances and submissions can be made directly to the Court or any individual or body that this Court may designate in furtherance of petitioner's request. If the Court should find petitioner unworthy of admission to the Bar without examination, the Court is requested to consider the alternative of permitting petitioner to sit as a candidate in a bar examination of this jurisdiction.

Petitioner is committed to the goals of his profession: to provide high-quality legal services, to work in behalf of the public interest, and to secure justice for all. This Honorable Court is urged to grant petitioner admission to the Bar of the District of Columbia without examination.

Respectfully Submitted:

s/ MARC FELDMAN
Marc Feldman
Fensterwald & Associates
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037
Tel: (202) 785-1636

Dated: June 13, 1977

Certificate of Service

I hereby certify that on this 13th day of June, 1977, I have served three copies of the foregoing Petition for Admission to the Bar of the District of Columbia Without Examination upon Anthony Nigro, Secretary of the Committee on Admissions, District of Columbia Court of Appeals, 400 F Street, N.W., Washington, D.C. 20001.

s/ MARC FELDMAN
Marc Feldman

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March 6, 1978

Honorable Theodore R. Newman, Jr.
Chief Judge
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Sixth Floor
Washington, D. C. 20001

Dear Chief Judge Newman:

We represent Mr. Marc Feldman, a member of the Virginia and Maryland Bars. Mr. Feldman is currently associated with Bernard Fensterwald, Jr., a member of the Bar of this Court who is practicing law in the District of Columbia. On June 13, 1977, Mr. Feldman petitioned the Court of Appeals for admission to its Bar under Rule 46 of the Court's Rules. To date, no action has been taken on this petition. We are writing this letter to urge the Court to act favorably on Mr. Feldman's petition by either admitting him without examination under Rule 46 I(c) or authorizing him to take the District of Columbia Bar examination under Rule 46 I(b). As we will show below, Mr. Feldman has abundantly demonstrated his fitness to practice law and it would be a gross injustice to exclude him from the Bar without even considering his individual qualifications. In the unique circumstances of his case, barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions under the United States Constitution and the federal antitrust

laws—questions that Mr. Feldman is prepared to pursue in the United States District Court if necessary.

Mr. Feldman's legal training and qualifications to practice law are described in detail in his petition and will only be briefly summarized here. When he graduated from college, Mr. Feldman elected not to attend law school but, rather, to obtain a legal education by pursuing a program of law office study. Accordingly, in October 1972, he began an apprenticeship with the law firm of Lowe & Gordon in Charlottesville, Virginia. Under the supervision of the firm's attorneys, Mr. Feldman devoted the next two-and-a-half years to mastering a broad range of legal subjects and tasks. The course of study that he pursued was explicitly authorized by Section 54-62 of the Virginia Code, under which persons may qualify for admission to the Virginia Bar by completing three years of law office study under the supervision of the Virginia Board of Bar Examiners. The Board has prescribed stringent requirements for law office study and Mr. Feldman observed these requirements fully. As his petition indicates, the Board required him to spend at least eighteen hours a week on law study, to file a detailed quarterly report on his educational progress, and to familiarize himself with twenty-one specified areas of the law, ranging from negotiable instruments to evidence. Mr. Feldman's study of these subjects was complemented by such practical training as drafting pleadings and other legal documents, legal research and trial preparation. Indeed, few law students can claim so thorough a grounding in the mechanics of conducting a legal practice.

To augment the training he obtained at Lowe & Gordon, Mr. Feldman audited courses at the University of Virginia School of Law. In addition, for the final six months of his three-year apprenticeship, Mr. Feldman served as a law clerk for the Honorable William Bryant, now the Chief Judge of the United States District Court for the District of Columbia. During this clerkship, which few other law students are able to experience, Mr. Feldman further expanded his research and drafting skills. He also gained a rare understanding of the operations of a major metropolitan trial court.

In February, 1976, Mr. Feldman took and passed the Virginia bar examination. He was admitted to the Virginia Bar on April 30, 1976, and to the Bar of the Supreme Court of Virginia on June 11, 1976. In February of 1977, Mr. Feldman took and passed the Maryland bar examination. Although the rules governing admission to the Maryland Bar require graduation from an accredited law school, the Maryland Board of Law Examiners determined that Mr. Feldman's training and experience qualified him to practice law in the absence of a law degree and this requirement was waived. Admission to the Maryland Bar was granted by the Court of Appeals of Maryland on June 28, 1977. From March 1, 1976 until January 1, 1977, Mr. Feldman was a staff attorney with the Baltimore Legal Aid Bureau, where he successfully maintained an active trial court caseload, provided advice to clients, and performed the other tasks required of a practicing attorney.

Because he wished to practice law in the District as an associate of Mr. Fensterwald, Mr. Feldman applied for admission to the District of Columbia Bar on November 26, 1976. After an informal hearing before the Committee on Admissions, Mr. Feldman's application was rejected on the ground that Rule 46 of this Court's rules requires all applicants for admission to be graduates of a law school accredited by the American Bar Association. In the view of the Committee, authority to grant waivers of this Rule rested solely with the Court itself. As a result of this determination, Mr. Feldman submitted a petition directly to this Court. His petition asked that he be "waived" into the Bar without examination as a member of the bar of another jurisdiction under Rule 46 I(c) or, in the alternative, that he be permitted to take the District of Columbia bar examination under Rule 46 I(b).

There can be no question that Mr. Feldman has provided abundant evidence of his fitness to practice law. He has completed a demanding and closely supervised program of law office study in accordance with the requirements of Virginia law; he has taken courses at an outstanding law school; he has clerked for a United States District Judge; he has passed the

bar examinations of two states; and, finally, he has satisfied the admissions criteria for these states and obtained substantial experience as an actual practitioner. Few candidates for admission appear before this Court with such a broad range of experience and such demonstrated professional competence.

As we understand it, however, the Committee on Admissions has advised Mr. Feldman that Rule 46 I bars him from even taking the D.C. bar examination because he is not a graduate of an A.B.A. accredited law school. While this may be a technically correct reading of the Rule, we do not believe it precludes the Court from considering Mr. Feldman's application on its merits. Under Section 11-2501 of the District of Columbia Code, the Court has plenary power to regulate the licensing of attorneys in the District. This power plainly includes the discretion to waive the requirements of Rule 46 in a deserving case. Clearly, Mr. Feldman's unusually high qualifications for admission provide an ideal occasion for the exercise of such discretion.

It is our understanding that, in prior situations, the Court has granted applications for admission from individuals who, like Mr. Feldman, had not graduated from A.B.A. accredited law schools. First, during the period 1975-1977, graduates of the International School of Law (which was then unaccredited) were permitted to take the D.C. bar examination by a number of special orders of this Court and, upon passing that examination, were admitted to the District of Columbia Bar. Attached is an Order of the Court waiving the requirements of Rule 46 I to permit certain International students to take the bar examination. No amendment of the Court's Rules was required in these cases. Rather, the Court exercised its inherent powers in the area of bar admissions—a course the Court should follow again here.

It is also our impression that at least one former Congressman, Thomas Rees, has been admitted to the D.C. Bar without graduating from an A.B.A. accredited law school. Mr. Rees, who we believe also pursued a program of law office study, is currently practicing in the District. It would appear that Mr.

Rees' admission was based on a provision of the United States District Court rules governing bar admission that applied specially to former Congressman and has since been rescinded. Nevertheless, in view of Mr. Rees' admission and the special treatment accorded International Law School graduates, failure to consider Mr. Feldman's application would be highly arbitrary and would raise serious questions about the fairness and even-handedness of the Court's policies regarding bar admissions.

Favorable action on Mr. Feldman's petition will not represent an adverse precedent that will impair the Court's ability to prescribe and maintain high standards for bar admissions in the future. There will be relatively few individuals who pursue a career in the law outside the framework of formal legal education. Moreover, as an exercise of the Court's discretion, a decision to admit Mr. Feldman would not commit the Court to admitting other prospective applicants whose qualifications are less impressive. Few aspiring attorneys will have Mr. Feldman's unusual combination of rigorous practical training, clerkship experience and success on the bar examinations of two jurisdictions. Hence, if Mr. Feldman is admitted, there will still be a principled and rational basis for rejecting the petitions of other non-graduates whose ability and training are demonstrated less conclusively. Apparently for this reason, the Maryland Board of Law Examiners determined that Mr. Feldman's education and skills qualified him to take the Maryland bar examination, even though Rule 5(b) of the Rules Governing Admission to the Bar of Maryland requires that all applicants graduate from an accredited law school. A similar exercise of discretion would be appropriate in this jurisdiction.

We hope that the Court will grant Mr. Feldman's petition as an exercise of its inherent supervisory power over the practice of law. If the Court is not inclined to take that course, it should be aware that serious questions under the United States Constitution are raised by any bar admissions procedure which automatically rejects applicants who have not graduated from an A.B.A. accredited law school, without any opportunity to

show that their experience and education provide equivalent evidence of their fitness to practice law.

In *Berger* v. *Board of Psychologist Examiners*, 172 U.S. App. D.C. 396, 521 F.2d 1056 (1975), the Court of Appeals for the District of Columbia Circuit invalidated a District law under which a license to practice psychology could not be issued to any person who lacked certain specified academic credentials. The successful plaintiff in *Berger* was a psychologist who, much like Mr. Feldman, had extensive practical experience, had studied with practicing psychiatrists and had taken several courses on psychology but was denied a license on the threshhold ground that he lacked a doctor's or master's degree in psychology. In condemning this denial, the Court of Appeals invoked the long line of Supreme Court decisions which hold unconstitutional irrebuttable statutory presumptions which deny individuals any opportunity to show that their personal qualifications entitle them to governmental benefits. 172 U.S. App. D.C. at 402. The District's licensing statute for psychologists created such a presumption, the court held, because it denied the plaintiff an opportunity to show that his "extensive clinical experience, coupled with his limited academic training and apprenticeship, have afforded him a professional competence equivalent to that of a doctor of psychology who has only two years of acceptable post-graduate experience." *Id.* at 402-403. An applicant such as the plaintiff, the court held, "must be accorded a fair opportunity to demonstrate his professional skill according to reasonable standards." *Id.*

It would be contrary to the principles adopted in *Berger* for this Court to refuse to consider Mr. Feldman's application for bar admission solely because he lacks a degree from an A.B.A. accredited law school. Rather, this Court must give him some opportunity to show that his unique training and experience have provided him with adequate qualifications to practice law. A flat rejection of Mr. Feldman's application without according him that opportunity would represent the very kind

of irrebutable presumption that the Supreme Court and the United States Court of Appeals have expressly condemned.

The federal antitrust laws provide an alternative basis for questioning the legality of a bar admissions procedure which presumes applicants to be unqualified if they lack a law degree and denies them any opportunity to show that their individual training and experience still qualify them to practice law. Under the Sherman Act, it is well-established that group boycotts constitute an unlawful restraint of trade. *See, e.g., Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959). This principle has been applied repeatedly to organizations which restrict entry into particular trades or professions. While recognizing that legitimate self-regulation is often necessary to maintain professional standards, the courts have consistently condemned exclusionary mechanisms more restrictive and arbitrary than the goal of self-regulation requires.

Epitomizing this judicial approach is *Denver Rockets* v. *All-Pro Management, Inc.* 325 F.Supp. 1049 (C.D. Cal. 1971). In that case, the court invalidated a National Basketball Association rule barring from professional basketball all players who were not college graduates. While recognizing the Association's right to prescribe eligibility requirements for its players, the court held that such requirements would be permissible only if:

> "(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
>
> "(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review." 325 F.Supp. at 1065."

The N.B.A. rule in question could not satisfy this test, the court held, because "there is no provision for even the most rudimentary hearing before the four-year college rule is applied

to exclude an individual player", nor "is there any provision whereby an individual player might petition for consideration of his specific case." 325 F.Supp. at 1066.

The approach embodied by the *Denver Rockets* decision is no aberration. It has been applied by many courts to condemn exclusionary practices in a wide variety of professions. *See, e.g., Silver* v. *New York Stock Exchange,* 373 U.S. 381 (1963); *Washington State Bowling Prop. Ass'n.* v. *Pacific Lanes, Inc.,* 356 F.2d 371 (9th Cir. 1966); *McGreery Angus Farms* v. *American Angus Assn.,* 379 F.Supp. 1008 (S.D. Ill. 1974); *Blalock* v. *Ladies Professional Golf Assn.,* 359 F.Supp. 1260 (N.D. Ga. 1973). Scrutinized under the test applied in these cases, it is clear that a bar admissions procedure that requires graduation from an A.B.A. accredited law school cannot stand. By denying worthy candidates like Mr. Feldman an opportunity to show that their individual qualifications are the equivalent of formal law school education, such a requirement is neither "reasonably related" to the purposes of regulating the practice of law nor "no more extensive than necessary". Since it unjustifiably denies individuals such as Mr. Feldman the opportunity to pursue the professions of their choice, that requirement is subject to challenge as an unreasonable restraint of trade proscribed by the Sherman Act.

Recent decisions have extended the reach of the antitrust laws to a wide range of quasi-governmental activities, including regulation of the practice of law. *See, e.g., Goldfarb* v. *Virginia State Bar, 421 U.S. 773 (1975); Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 144 U.S. App. 56 (D.C. Cir. 1971). Thus, bar admissions policies challenged under the antitrust laws can no longer be presumed to be immune from attack and may well receive the same searching judicial scrutiny as the exclusionary pratices of other professions.

We are aware that the Court's caseload and its other responsibilities may have diverted its attention from Mr. Feldman's petition. At the same time, however, prompt resolution of his application for admission to the D.C. Bar is essential so that

Mr. Feldman can plan his future personal and professional activities. Accordingly, if the Court has not acted on his petition within thirty days, we will be compelled to construe its silence as a denial of that petition and will therefore bring suit in the United States District Court for the District of Columbia.

We appreciate the consideration that the Court has devoted to this matter.

Respectfully yours,

Robert M. Sussman

RMS/msh

cc: Judge Kelly
Judge Kern
Judge Gallagher
Judge Nebeker
Judge Yeagley
Judge Harris
Judge Mack
Judge Ferren
Alexander L. Stevas
Jacob A. Stein, Esq.
Anthony Nigro
Marc Feldman

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED NOV 18 1977

Clerk

District of Columbia
Court of Appeals

No. JANUARY TERM, 19 77

BEFORE: Newman, Chief Judge, Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

ORDER

On consideration of the petitions submitted by ~~Tennessee R. Beale, Dwight Michael Ellis, Mary Emerson Jolly, Stephen T. Zachary~~, and ~~Anthony James Cargani~~, graduates of the International School of Law, for a temporary waiver of Rule 46 I(b)(3), it is

ORDERED that the provisions of Rule 46 I(b)(3) are hereby waived to permit August 1977 graduates of the International School of Law, as well as former graduates, if any, to sit for the February 1978 D.C. Bar Examination only. It is

FURTHER ORDERED that those graduates of the International School of Law who have been unsuccessful in prior D.C. bar examinations and those who may be unsuccessful in the February 1978 D.C. Bar Examination will be permitted to take future D.C. bar examinations without further petition absent an order of this Court rescinding this order.

Any law student of the International School of Law who graduates subsequent to August 1977 shall only be permitted to take the D.C. bar examination provided the International School of Law at the time of graduation has received its accreditation from the American Bar Association as an approved law school.

PER CURIAM.

FOR THE COURT:

THEODORE R. NEWMAN, JR.
Chief Judge

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

CHAMBERS OF
CHIEF JUDGE THEODORE R. NEWMAN, JR.

March 29, 1978

Robert M. Sussman, Esquire
Covington & Burling
888 16th Street, N.W.
Washington, D. C. 20006

RE: Marc Feldman

Dear Mr. Sussman:

This is to acknowledge your letter of March 6, 1978, on behalf of the petition of Marc Feldman for a waiver of this Court's Rule 46.

Pursuant to the usual practice of this Court, Mr. Feldman's petition was referred to the Committee on Admissions for its review. The Committee recognizes that Mr. Feldman's record indicates he has had an exceptional opportunity for training and is a personable, impressive, and outstanding individual. However, the purpose of the rule, which requires graduation from a law school approved by the American Bar Association or 24 hours of study after graduation from a non-approved law school to be eligible to sit for the bar examination, is to prevent the Committee and the Court from assuming the practicably impossible task of making separate subjective evaluations of each applicant's training and education; hence, an objective and reasonable standard as prescribed by the rule must be utilized.

The Committee unanimously has recommended that the petition of Mr. Feldman be denied, and the Court has con-

cluded that its rules should not be waived. Mr. Feldman, of course, will be eligible to make an application for admission to the bar after he has completed five years of practice.

Sincerely,

s/ TRN J
Theodore R. Newman, Jr.
Chief Judge

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED MAR 30 1978

District of Columbia
Court of Appeals Alexander L. Stevas
Clerk

No. JANUARY TERM, 1978

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

ORDER

On consideration of the petition of Marc Feldman to waive the provisions of Rule 46 of the General Rules of this Court, it is

ORDERED that applicant's petition is denied.

PER CURIAM.

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia
Court of Appeals
Rec'd. Apr 10 1978
Alexander L. Stevas

In the Matter of

EDWARD J. HICKEY, JR.

SPECIAL PETITION
FOR A WAIVER OF
DISTRICT OF COLUMBIA COURT OF APPEALS
RULE 46 I.(b)(3)

Fred F. Fielding
Wayne M. Lee

Attorneys for Petitioner,
EDWARD J. HICKEY, JR.

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-5000

DISTRICT OF COLUMBIA

COURT OF APPEALS

In the Matter of

EDWARD J. HICKEY, JR.

SPECIAL PETITION FOR A WAIVER OF DISTRICT OF COLUMBIA COURT OF APPEALS RULE 46 I.(b)(3)

Petitioner seeks a waiver of the District of Columbia Court of Appeals Rule 46 I.(b)(3) requirement making graduation from a law school "approved by the American Bar Association" a prerequisite to sitting for the District of Columbia Bar examination.[1] This petition should be granted for the following reasons:

I. *Petitioner Is Substantively Qualified To Sit For The Bar Examination.*

In May 1978, petitioner will have completed 87 credit hours of formalized legal studies at the Potomac School of Law in the District of Columbia. Petitioner has performed well at Potomac, ranking in the top half of his class. He has served as a founding editor of the *Potomac Law Review,* has participated on Potomac's Jessup Moot Court Team, and is a member of Delta Theta Phi National Law Fraternity. Petitioner's transcript (attached as Exhibit A) shows that he has taken a

1 "An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school."

rigorous law school curricula including a course in each subject tested on the D.C. Bar Examination. *Compare* Exhibit A with Rule 46 I.(b)(7). Attached (as Exhibits B through E) are four affidavits of prominent members of the Bar of this Court who have witnessed the performance of petitioner in his legal studies. These affidavits, written by law professors (two of whom are also judges) familiar with the abilities of petitioner, evidence petitioner's competence to sit for the bar examination.

II. *Petitioner's Unique Background Makes Him A Desirable Candidate For Membership In The Bar Of The District Of Columbia.*

Petitioner grew up (from age five) in the District of Columbia at the family home on Euclid Street, N.W. After attending local primary schools, petitioner entered St. John's College High School in northwest Washington, where he compiled a record of high academic achievement. This outstanding academic record, combined with his exemplary personal qualities, resulted in petitioner being selected as one of the few students from the District of Columbia to receive a coveted Naval Reserve Officers Training Corps scholarship. The receipt of this scholarship enabled petitioner to attend the College of Holy Cross in Worcester, Massachusetts. At Holy Cross, petitioner continued to demonstrate his superior academic prowess by graduating in the top 20 percent of his class (majoring in mathematics), while at the same time contributing to the college community by participating in various campus activities. Upon receiving his Bachelor of Science degree from Holy Cross, petitioner was commissioned an ensign in the United States Navy.

For the next 20 years petitioner served this country as a Navy fighterpilot, rising to the rank of Commander. Spanning the globe, petitioner's varied assignments included flying 176 carrier-based combat missions over North Vietnam during the Vietnam War. In recognition of his achievements the Navy awarded petitioner the Distinguished Flying Cross, the Vietnam Cross of Gallantry with Silver Star, and the Vietnam

Cross of Gallantry with Palm Cluster, in addition to numerous air medals.

At the conclusion of his Naval career, petitioner decided to remain in the Washington area (the location of his last duty station) intent on pursuing a career in law.[2] With that objective in mind, petitioner applied to the Georgetown University Law Center in the fall of 1973. Georgetown placed petitioner on its waiting list in the spring of 1974, but finally denied his application in August 1974. Not having the luxury of time that a younger man might, petitioner chose to enter Potomac School of Law, an institution of legal education licensed by the District of Columbia Board of Education (now licensed by the Board of Trustees of the University of the District of Columbia), in March 1975 rather than seeking admission elsewhere at a later date.

III. *Petitioner Reasonably Expected To Be Eligible To Sit For The Bar Examination At Or Near The Time He Commenced His Legal Studies More Than Three Years Ago.*

At the time petitioner entered Potomac School of Law he knew that the school would have to seek approval from the American Bar Association. Petitioner considered that, at the very least, one year of schooling might aid his ability to transfer, if necessary, to an ABA-approved law school. Within weeks of petitioner's commencement of studies at Potomac, however, the International School of Law—at the time a new and unapproved law school located in the District of Columbia—petitioned this Court seeking permission for its graduates to sit for the July 1975 bar examination. This Court approved the petition. Indeed, this Court allowed members of the first three graduating classes of the International School of Law to sit for the bar examination.

This Court's previously implemented policy of allowing the first three years' graduating classes of a new law school in the

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2 One of the reasons petitioner finally chose to leave the Navy after 20 years of service was to allow him and his family to reestablish roots in the Washington area after continuous moving throughout his Navy career.

District of Columbia to sit for the bar examination is a necessary and proper policy for a new law school and should be continued. It is nearly impossible to meet the strict standards for ABA approval in the mere three years between the inception of a new law school and its first graduation. Amassing the requisite number of library volumes and the financial resources required for such approval is a momentous task to accomplish in such a short period.

Until November of 1977, petitioner fully anticipated being treated in the same fashion as graduates of the International School of Law; that is, to receive permission to sit for the bar examination. This expectation continued until November 1977 when this Court denied the petition of Potomac School of Law seeking permission for its graduates to sit for the July 1978 bar examination. Although that order places future students of Potomac School of Law on notice that they will not be allowed to sit for the bar examination unless the school receives its ABA approval by the time they graduate, it would be unfair to apply that ruling to students currently enrolled in Potomac who have pursued three years of legal education in reliance on the former policy of this Court. Applying such a rule to petitioner would impose a severe burden upon him.

IV. *Requiring Compliance With Rule 46 I.(b)(4) Would Be Inequitable In This Case, Even If Qualification To Sit For The Bar Examination Under Its Provisions Were Possible, An Extremely Doubtful Proposition.*

If the Court should deny this petition, petitioner's only alternative would be to utilize Rule 46 I.(b)(4) which seems to permit graduates of unapproved law schools to sit for the bar examination upon completion of 24 credit hours at an approved law school.[3] Requiring petitioner to undertake 24 addi-

3 Rule 46 I.(b)(4) provides:

> An applicant who graduated from a law school not approved by the American Bar Association may be permitted admission to an examination only after receiving credit for 24 hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval.

tional credit hours, on top of the 87 he will have when he graduates, is unnecessary, and would be burdensome. Because he has satisfactorily completed courses in all of the subjects covered by the bar examination, petitioner would merely take elective courses in subject areas not even tested by the bar examination if he is forced to complete an extra year of law study.[4]

Petitioner has given 20 years service to his country. He is no longer a young man. At 45, he has the responsibility for providing for a wife and two small children. Petitioner has risked his life for this country—not merely during 176 combat missions, but also every time his jet fighter was catapulted off an aircraft carrier's deck and every time it lifted off a runway. Petitioner's twenty years of honorable service have demonstrated, far beyond that of the average bar exam candidate, that he possesses the qualities essential to a good lawyer, including: judgment, maturity, courage in the face of adversity, concern for his fellow man, commitment to our society and attention to detail. These compelling reasons demonstrate that forcing petitioner to forego earning an income for another year, and to incur the substantial expense of another year of law school, would serve no useful purpose in this case. Far more than most, this man has earned the right to sit for the bar examination.

Beyond these factors, it is unlikely that petitioner would be admitted to any of the ABA-approved law schools in Washington, D.C. in an attempt to comply with the Rule. On information and belief, petitioner avers that the ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement. This avenue of qualifying to sit for the bar examination, therefore, is effectively unavailable to petitioner.

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4 Petitioner warrants that he will take a bar review course in preparation for the bar examination if this petition is granted.

V. *Conclusion.*

For the foregoing compelling reasons, Rule 46 1.(b)(3) should be waived in this case.

Respectfully submitted,

Fred F. Fielding
(D.C. Bar No. 194118)

Wayne M. Lee
(D.C. Bar No. 222885)

Attorneys for Petitioner,
EDWARD J. HICKEY, JR.

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036

April 18, 1978

[redacted]	[redacted]	[redacted]	577-46[redacted]
8140 Atwell Road		7/20/12	Boston, Mass.
Potomac, Md. 20854		First Semester	
1/31/73			

	SPRING 1975				Fall 1977			
	Contracts I	03	B	9				
	Legal Research I	02	B	6	Bankruptcy	2	C+	5.0
	Property I	03	B	9	Consumer Law	3	B	9.0
	Torts I	02	C	4	Equity	2	A	8.0
					Federal Jurisdiction	2	C+	5.0
	FALL 1975				International Law	2	B	6.0
					Legal Writing	2	C	4.0
	Constitutional Law I	2	B	6				
	Contracts II	3	B	9				
	Property II	3	B	9				
	Torts II	2	A	8				
	Spring 1976							
	Civil Procedure	2	C	4				
	Constitutional Law II	4	B	8				
	Criminal Law & Procedure	4	B	12				
	Summer 1976							
	Individual Rights	2	C+	5				
	Fall 1976							
	Transferred to Day Division							
	Administrative Law	3	B	9				
	Agency & Partnership	3	B	9				
	Evidence	4	C	8				
	Founding Editor of Potomac Law Review							
	Spring 1977							
	Commercial Law	4	[illegible]	8.0				
	Corporations	3	[illegible]	9.0				
	Decedent's Estates & Trusts	4	[illegible]	14.0				
	Family Law	3	[illegible]	10.5				
	Federal Income Taxation	3	[illegible]	[illegible]				
	Summer 1977							
	Trial Tactics	2	B	6.0				

IN GOOD STANDING

EXHIBIT B

AFFIDAVIT OF TIM MURPHY

I, TIM MURPHY, Associate Judge of the Superior Court for the District of Columbia, being duly sworn and under oath do declare as follows:

1. I was admitted to the Bar of the District of Columbia in 1954 and to the Bar of the State of New York in 1955.

2. I have practiced law in the District of Columbia as an attorney for the National Labor Relations Board, Assistant United States Attorney for the District of Columbia, and Chief Assistant United States Attorney in charge of the D.C. Court of General Sessions Division, U.S. Attorney's Office. For the past eleven years I have been Associate Judge of the Superior Court for the District of Columbia.

3. During my legal career I have been a faculty member of the Catholic University Law School and the Georgetown Law Center. I have been a guest lecturer at Harvard University, Boston University, Duke University, Howard University, George Washington University of Maryland, and the University of Chicago.

4. I am currently a member of the faculty of the Potomac School of Law where I teach courses in contracts and trial techniques.

5. As a faculty member of the Potomac School of Law, I have instructed Mr. Edward J. Hickey in both contracts and trial techniques.

6. In teaching the course on trial techniques it is my practice to require students to demonstrate an ability to perform adequately in every area of trial practice covered by my course.

7. My experience at the Potomac School of Law has convinced me that Mr. Hickey has received a legal education at least comparable in quality to that provided by other law schools where I have been a faculty member.

8. Having observed Mr. Hickey's performance both in and outside my classes, I am convinced that he is fully prepared to practice law in the District of Columbia and that he would be a positive addition to the Bar.

S/ TIM MURPHY
Tim Murphy

City of Washington,
District of Columbia, SS:

Signed and sworn to before me, a Notary Public, this 17th day of April, 1978.

S/ JACQUELINE S. JAFFE
Jacqueline S. Jaffe
Notary Public

[SEAL]

My commission expires 3/31/79.

EXHIBIT C

AFFIDAVIT OF WILLIAM C. PRYOR

I, WILLIAM C. PRYOR, Associate Judge of the Superior Court for the District of Columbia, being duly sworn and under oath, do declare as follows:

1. I was admitted to practice law in the District of Columbia in 1959 and in Ohio in 1966. I was admitted to practice before the United States Supreme Court in 1966.

2. I have practiced law in the District of Columbia and Ohio as an attorney, Civil Division, Department of Justice; Assistant United States Attorney for the District of Columbia; attorney for Ohio Bell Telephone Company; and attorney for Chesapeake and Potomac Telephone Company. For the past ten years, I have been an Associate Judge of the Superior Court for the District of Columbia.

3. I am a former faculty member of the Georgetown Law Center. I am currently a faculty member of the Potomac School of Law where I teach criminal law and criminal procedure.

4. As a faculty member of the Potomac School of Law, I have taught Mr. Edward J. Hickey in my criminal law and criminal procedure classes.

5. From observing Mr. Hickey's performance in my class, I am confident that Mr. Hickey could more than adequately represent a defendant in my courtroom. Furthermore, I am convinced that he is fully prepared to sit for the Bar examination in this jurisdiction and that his exemplary personal attributes qualify him to practice law in the District of Columbia.

S/ WILLIAM C. PRYOR
William C. Pryor

April 14, 1978

City of Washington
District of Columbia, SS:

Signed and sworn to before me, a Notary Public, this 14th day of April, 1978.

S/ JACQUELINE S. JAFFE
Jacqueline S. Jaffe
Notary Public

[SEAL]

My commission expires March 31, 1979.

EXHIBIT D

AFFIDAVIT OF JOSEPH F. ENGLISH

I, JOSEPH F. ENGLISH, Professor Emeritus, Catholic University Law School and Professor, Potomac School of Law, being duly sworn and under oath, do declare as follows:

1. I was admitted to the District of Columbia Bar Association in 1929 and to the Pennsylvania Bar Association in 1931.

2. I have practiced law as a senior attorney for the United States government; Assistant Prosecutor at the Tokyo Trials, Japan; Solicitor, International Claims Commission of the United States; and in private practice in Scranton, Pennsylvania.

3. For the past twenty-three years, I have been a professor of law at the Catholic University Law School. I have been Professor Emeritus at the Catholic University Law School since 1969, and I have been a member of the faculty of the Potomac School of Law since 1975.

4. I have instructed Mr. Edward J. Hickey in courses in property and decedents' estates and trusts at Potomac School of Law.

5. Having known Mr. Hickey since March 1975 and having observed his performance in my classes, I am conviced that Mr. Hickey is an intelligent and competent as any of the better students I have ever taught. Furthermore, his vast experience and varied background would bring to the Bar qualities that would be beneficial to those requiring legal services in the District of Columbia.

6. I am certain that Mr. Hickey is fully prepared to take the Bar examination for the District of Columbia and subsequently to practice law in the District of Columbia.

S/ JOSEPH F. ENGLISH
Joseph F. English

City of Washington
District of Columbia, SS:

Signed and sworn to before me, a Notary Public, this 14th day of April, 1978.

s/ JACQUELINE S. JAFFE
Jacqueline S. Jaffe
Notary Public

[SEAL]

My commission expires March 31, 1979.

EXHIBIT E

AFFIDAVIT OF DAVID M. BARRETT

I, DAVID M. BARRETT, Assistant Professor and Assistant Dean, Potomac School of Law, being duly sworn and under oath, do declare as follows:

1. I am a member of the Bar of the District of Columbia and of the States of Indiana and Oklahoma. I am admitted to practice before the Supreme Court of the United States.

2. I have practiced law as Assistant United States Attorney for the District of Columbia; County Attorney for St. Joseph County, Indiana; Vice President and General Counsel to Warren American Oil Company; Vice President and General Counsel to the William K. Warren Foundation; private practice in Tulsa, Oklahoma; and as a partner in Dunnells, Duvall and Porter, Washington, D.C.

3. I am a former member of the faculty of the Notre Dame Law School, and I am currently Assistant Dean and a member of the faculty of the Potomac School of Law.

4. At Potomac School of Law, I have instructed Mr. Edward J. Hickey in Civil Procedure, Bankruptcy and Labor law.

5. As a result of Mr. Hickey's performance in my class, I am convinced that Mr. Hickey is better prepared to sit for the Bar examination than most law students I have taught, and that he greatly exceeds the standard of competence necessary to become a member of the District of Columbia Bar.

S/ DAVID H. BARRETT
David H. Barrett

City of Washington
District of Columbia, SS:

Signed and sworn to before me, a Notary Public, this 14th day of April, 1978.

S/ JACQUELINE S. JAFFE
Jacqueline S. Jaffe
Notary Public

[SEAL]

My commission expires March 31, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Marc Feldman
2101 L Street, N.W.
Washington, D. C. 20037
(202) 785-1636

Plaintiff,

—v.—

William C. Gardner
Chairman, Committee on Admissions
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 628-7058

Anthony Nigro
Secretary, Committee on Admissions
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 347-8462

Committee on Admissions
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 347-8462

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 638-7113

The Honorable Theodore R. Newman, Jr.
Chief Judge, District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 638-4392

Defendants.

Green, J.
Civil Action No.
78-0957
May 26 1978

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action arising under the United States Constitution and the Federal antitrust laws. The plaintiff, Marc Feldman, has completed a program of law office training authorized by the state of Virginia. He has also passed the bar examinations of Virginia and Maryland and has been admitted to the Bars of both states. Nevertheless, plaintiff has been denied admission to the District of Columbia Bar because (1) the Court of Appeals Rules governing bar admissions require graduation from a law school accredited by the American Bar Association (ABA), and (2) the Court has refused to exercise its plenary power over the licensing of attorneys to waive these rules on plaintiff's behalf. Defendants' refusal to consider plaintiff's individual qualifications to practice law is unlawful in view of his demonstrated fitness and competence, as well as the prior admission to the D.C. bar of several other individuals who did not attend an accredited law shcool. Accordingly, plaintiff seeks (1) a declaration that defendants' actions have violated the Fifth Amendment to the Constitution and the Sherman Act, and (2) an injunction requiring defendants either to grant plaintiff immediate admission to the District of Columbia bar or to permit him to sit for the bar examination as soon as possible.

JURISDICTION

2. Plaintiff's cause of action is based on the Fifth Amendment to the United States Constitution; the Civil Rights Act, 42 U.S.C. §§ 1981, *et seq.*; and the Sherman Act, 15 U.S.C. §§ 1,2. The amount in controversy exceeds $10,000., exclusive of interests and costs. This Court has jurisdiction under the Fifth Amendment of the United States Constitution; 28 U.S.C. §§ 1331, 1343, 1361, 2201 and 2202; and Sections 4 and 16 of the Clayton Act as amended, 15 U.S.C. §§ 15, 26. Each of the defendants is found within, and is subject to service of process in, the District of Columbia.

PARTIES

3. Plaintiff Marc Feldman is currently employed at the law firm of Fensterwald & Associates, which is located at 2201 L Street, N.W., Washington, D.C. 20037. Mr. Feldman, who is a resident of the District of Columbia, is a member of the Bars of Maryland and Virginia. As described more fully below, however, he has been denied admission to the Bar of the District of Columbia because he did not graduate from an ABA accredited law school.

4. The defendant William C. Gardner is chairman of the defendant Committee on Admissions of the District of Columbia Court of Appeals. This Committee is empowered by Rule 46 I of the Court of Appeals rules to make recommendations concerning applications for admission to the D.C. Bar. Defendant Gardner is sued in his official capacity.

5. Defendant Anthony Nigro is the Secretary of the Committee on Admissions of the District of Columbia Court of Appeals. As Secretary, his function is to screen all applications for admission to the bar for compliance with the applicable Court of Appeals rules governing admissions. Defendant Nigro exercised such a function with respect to the application of plaintiff. Defendant Nigro is sued in his official capacity.

6. Defendant Committee on Admissions is composed of practicing lawyers appointed by the Court of Appeals. Under Rule 46 I of the Court's Rules, the Committee is responsible for overseeing admissions to the D. C. Bar.

7. Defendant District of Columbia Court of Appeals derives its jurisdiction from the District of Columbia Court Reform and Criminal Procedure Act of 1970, Title 11, District of Columbia Code. Under Section 11-2501 of the District of Columbia Code, the Court of Appeals has comprehensive power to regulate the licensing of attorneys in the District. Reflecting this power, Rule 46 of the Court of Appeals General Rules prescribes standards and procedures for admissions to the District of Columbia Bar.

8. Defendant Theodore R. Newman, Jr. is Chief Judge of the District of Columbia Court of Appeals. As described more fully below, by letter dated March 29, 1978, Chief Judge Newman informed plaintiff that his petition for admission to the District Bar had been denied. Judge Newman is sued in his official capacity.

FIRST CLAIM

9. After graduating from college, plaintiff decided that he wished to become an attorney. Instead of attending law school, however, plaintiff chose to obtain a legal education by pursuing a program of law office study.

10. In October, 1972, plaintiff began an apprenticeship with the law firm of Lowe & Gordon in Charlottesville, Virginia. The program of law office study chosen by plaintiff is explicitly authorized by Section 54-62 of the Virginia Code, under which persons may qualify for admission to the Virginia Bar by completing three years of law office study under the supervision of the Virginia Board of Bar Examiners. Attached as Exhibit A are copies of Section 54-62 and a memorandum from the Virginia Board of Law Examiners which describes the requirements for fulfilling a program of law office study.

11. Plaintiff chose this alternative method of legal education because of his belief that the training it provided would best prepare him to be a practicing attorney. Plaintiff has never submitted an application for admission to any law school.

12. The course of study prescribed by the Virginia Board of Bar Examiners required plaintiff to spend at least 18 hours a week on law study, to file a detailed quarterly report on his educational progress, and to familiarize himself with 21 specified areas of the law, ranging from negotiable instruments to evidence. In addition to complying with these requirements, Mr. Feldman augmented his legal training with such practical activities as drafting pleadings and other legal documents, legal research and trial preparation.

13. To further enhance the practical training he received at Lowe & Gordon, plaintiff formally audited courses at the University of Virginia law school in theoretical subjects where he believed his Lowe & Gordon experience might be inadequate. During the five semesters for which this auditing continued, plaintiff attended six different classes. Had he been enrolled at the law school, he would have obtained approximately 18 hours of credit.

14. With the approval of the Virginia Board of Bar Examiners, plaintiff spent the final six months of his three-year apprenticeship as a law clerk to the Honorable William Bryant, now the Chief Judge of this Court. During this period, plaintiff assumed the full range of legal responsibilities associated with clerking for a federal district court judge.

15. In February, 1976, plaintiff took the Virginia bar examination. He was informed that he had passed in March, 1976, and was admitted to the Virginia Bar on April 30, 1976, and to the Bar of the Supreme Court of Virginia on June 11, 1976.

16. From March 1, 1976 until January 1, 1977, plaintiff was a staff attorney with the Legal Aid Bureau in Baltimore, Maryland. In this capacity, plaintiff maintained a trial court case load, provided advice to clients, and performed the other tasks required of a practicing attorney.

17. Rule 5(b) of the Rules Governing Admission to the Bar of Maryland provides that no person may take the Maryland bar examination unless he or she has graduated from an accredited law school. Nevertheless, exercising its discretion under Rule 5(c) of the Rules Governing Admission, the Maryland Board of Law Examiners determined that plaintiff's education and experience qualified him to be a practicing attorney, and the requirement of attendance at an accredited law school was accordingly waived.

18. In February of 1977, plaintiff took the Maryland bar examination. On May 12, 1977, plaintiff was informed that he had passed that examination. Plaintiff was admitted to the

Maryland Bar by the Court of Appeals of Maryland on June 28, 1977.

19. On November 26, 1976, plaintiff submitted to defendant Nigro, as Secretary of the Committee on Admissions, a completed application, plus accompanying documents and fees, for admission to the District of Columbia Bar. Plaintiff based this application on Rule 46 I(c) of the Court of Appeals rules which, prior to its recent amendment, provided that members of the bars of other jurisdictions would be admitted to practice in the District without examination.

20. In a letter dated January 7, 1977, defendant Nigro advised plaintiff that his application could not be accepted. According to the letter, the grounds for this action were that plaintiff had not graduated from a law school approved by the American Bar Association in accordance with Rule 46 of the Court of Appeals Rules and waivers or exceptions to the Rule were not authorized.

21. Plaintiff then brought his application to the attention of Jacob A. Stein, then the Chairman of the Committee on Admissions. As a result, the Committee asked plaintiff to appear for an informal hearing on May 9, 1977.

22. By letter dated May 11, 1977, the Committee on Admissions informed plaintiff that, in its view, only the Court of Appeals could waive the requirement of graduation from an accredited law school and, therefore, plaintiff's application for admission would be denied.

23. On June 13, 1977, plaintiff submitted a petition to the District of Columbia Court of Appeals seeking admission to the Bar of the District of Columbia without examination. This petition, a copy of which is attached as Exhibit B, contained a detailed recitation of plaintiff's legal training and practical legal experience.

24. After several months had passed without any action on plaintiff's petition, counsel for plaintiff, by letter dated March 6, 1978, wrote defendant Newman to stress that plaintiff's

petition was still pending and to restate the considerations favoring plaintiff's admission. This letter is attached as Exhibit C. On the basis of plaintiff's demonstrated competence and considerable practical training, counsel argued that the Court should waive Rule 46 and admit plaintiff in an exercise of its discretionary power over bar admissions. Counsel also pointed out that Rule 46 had been waived on prior occasions to permit the admission of applicants who lacked degrees from an accredited law school. Finally, counsel argued that, on its face and as applied, Rule 46 violated both the United States Constitution and the federal antitrust laws insofar as it conclusively denied admission to the bar to all persons except graduates of an ABA accredited law school. Counsel also underscored plaintiff's willingness to sit for the District of Columbia bar examination if the Court deemed it necessary.

25. In a letter dated March 29, 1978, defendant Newman responded to the letter of plaintiff's counsel. Judge Newman's letter, a copy of which is attached as Exhibit D, acknowledged "that Mr. Feldman's record indicates he had had an exceptional opportunity for training and is a personable, impressive, and outstanding individual." However, the letter then informed plaintiff that the Court had decided not to waive Rule 46 because "an objective and reasonable standard as prescribed by the Rule must be utilized." The letter enclosed an Order of the Court of Appeals, a copy of which is attached as Exhibit E, unanimously denying plaintiff's petition to waive Rule 46.

26. On several prior occasions, the Court of Appeals—and its predecessor courts which regulated bar admissions in the District of Columbia—have waived the requirement of graduation from an ABA accredited law school and granted bar admission to applicants whose qualifications are no more, and often much less, impressive than plaintiff's.

27. Because plaintiff is not a member of the District of Columbia Bar, his ability to practice the profession of his choice has been sharply curtailed. Among other things, plaintiff cannot appear in the Superior Court of the District of

Columbia or the District of Columbia Court of Appeals, and is unable to solicit clients. Because of these restrictions, both the personal satisfaction and monetary remuneration plaintiff can derive from the legal profession have been severely limited.

28. Defendants' refusal to admit plaintiff to the District of Columbia Bar has violated plaintiff's rights under the Fifth Amendment to the United States Constitution in the following respects:

(a) By limiting bar membership to graduates of an ABA accredited law school, Rule 46 I of the Court of Appeals General Rules creates an irrebutable presumption that only graduates of such law schools are fit to practice law in the District of Columbia and, thus, deprives persons who have pursued alternative methods of legal training of their property and liberty without due process of law;

(b) By limiting bar admission in the District of Columbia to graduates of an ABA accredited law school, Rule 46 I impermissibly and irrationally discriminates against persons who have obtained equivalent legal training by other means and, thus, denies such persons the equal protection of the laws;

(c) By conclusively presuming that only graduates of an ABA accredited law school are fit to practice law in the District of Columbia, Rule 46 I impermissibly delegates to the American Bar Association the Court of Appeals' power to regulate the practice of law and, hence, deprives persons with alternative legal training of their property and liberty without due process of law;

(d) By refusing to consider whether plaintiff's individual qualifications and training were equivalent to graduation from an ABA accredited law school and for that reason justified a waiver of Rule 46 I, the defendant Court of Appeals acted arbitrarily and capriciously and, accordingly, deprived plaintiff of his liberty and property without due process of law;

(e) Because it and its predecessor courts have repeatedly waived the requirements of Rule 46 I and permitted the admission of persons who did not graduate from ABA accredited law schools, the Court of Appeals' refusal to consider plaintiff's individual qualifications and training was unreasonable and discriminatory and, accordingly, both denied plaintiff the equal protection of the laws and deprived him of his liberty and property without due process of law.

SECOND CLAIM

29. Plaintiff realleges the allegations contained in paragraphs 8 through 27 above.

30. By limiting admission to the D.C. bar to graduates of an ABA accredited law school, defendants have unreasonably restricted entry into the legal profession and, thus, have entered into a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

31. By limiting admission to the bar to graduates of an ABA accredited law school, defendants have attempted to monopolize, and have in fact created a monopoly over, the practice of law in the District of Columbia in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

32. Because defendants' violations of the antitrust laws have curtailed plaintiff's professional opportunities and earning potential, he has sustained injury to his business or property within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests the following relief:

1. A declaration (a) that Rule 46 I of the Court of Appeals rules, either on its face or as applied to plaintiff, is violative of the Fifth Amendment to the United States Constitution, (b) that defendants' refusal to consider plaintiff's individual quali-

fications and training to practice law was, and is, a violation of plaintiff's rights under the Fifth Amendment to the United States Constitution, and (c) that defendants' rejection of plaintiff's application for admission to the bar because he did not graduate from an ABA accredited law school constitutes a violation of the Federal antitrust laws.

2. An Order requiring defendants to either (a) forthwith admit plaintiff to the District of Columbia Bar without examination pursuant to the provisions of Rule 46 I in effect prior to January 1, 1978, (b) allow plaintiff to sit for the District of Columbia bar examination at the earliest possible date, or (c) determine whether plaintiff's individual qualifications and training have provided him with the same competence to practice law as graduation from an ABA accredited law school and, if so, to admit plaintiff to the District Bar forthwith or permit him to sit for the bar examination as soon as possible.

3. Such other and further relief as this Court deems just and equitable.

Respectfully submitted,

S/ ROBERT M. SUSSMAN
Robert M. Sussman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006
(202) 452-6149

Counsel For Plaintiff

Dated: May 25, 1978

EXHIBIT A

CODE OF VIRGINIA

§ 54-62. *Preliminary proof of education required of applicant.* In addition to the certificate required by §§ 54-60 and 54-61, every applicant before taking any examination under this article shall furnish to the Board satisfactory evidence that such applicant has:

(1) Received a degree or certificate from a law school approved by the American Bar Association, or the Board, or,

(2)(i) Completed at least a three-year academic course of an accredited college and (ii) studied law for at least three years, in the office of an attorney practicing in this State, whose full time is devoted to the practice of law, or studied law for a least three years partly in a law school approved by the American Bar Association or the Board and partly in said practicing attorney's office. The attorney in whose office the applicant intends to study shall be approved by the Board which shall prescribe reasonable conditions as to such course of study. (Code 1919, § 3413; 1934, p. 411; 1936, p. 79; 1952, c.553; 1960, c.379)

Code Commission note. — Section 54-61, referred to in this section, was repealed by Acts 1972, c.824.

VIRGINIA BOARD OF BAR EXAMINERS

Richmond, Virginia

MEMORANDUM TO APPLICANTS WHO PLAN TO STUDY UNDER ATTORNEYS:

A. Pursuant to Section 54-62(2) of the Code of Virginia of 1950, as amended, an applicant may qualify for the bar examination in Virginia:

(1) By studying for a period of three calendar years in the office of an attorney practicing in this State whose full time is devoted to the practice of law; or,

(2) By studying for a period of three years partly in an approved law school and partly in an attorney's office.

B. An applicant who plans to study under an attorney must make application to the Board upon a form furnished by the Secretary of the Board, which application shall also contain a certificate of the attorney that the course of study will be in accordance with the requirements of the Board. Prior to making application to study under an attorney, however, the applicant must have successfully completed at least a three-year academic course of an accredited college.

C. The following general rules, regulations and requirements have been adopted by the Board for law study under attorneys:

1. No credit will be given for study completed under an attorney prior to the date of approval of the application by the Board. The applicant will be notified promptly when his application has been approved.

2. The applicant shall study in the physical confines of the attorney's office, which office must be located in this State, at least eighteen hours per week for at least ten weeks out of each thirteen-week quarter. This is a minimum quarterly requirement while studying under an attorney.

3. The study shall be under the guidance and effective supervision of the attorney *and during regular office hours.* The study must be continuous and pursued without interruption.

4. At the end of each quarter, the applicant must file promptly with the Secretary of the Board a quarterly report indicating that he has studied the required minimum number of hours *and the attorney shall certify that the applicant's study has been under his personal guidance and supervision within his office and during regular office hours for at least eighteen (18) hours per week for at least ten (10) weeks.* The quarterly report form will be furnished applicant by the Secretary of the Board.

5. Upon completion of the three-year period of study, a final certificate shall be filed by the applicant and the attorney, on a form furnished by the Secretary of the Board, indicating the completion of study of the prescribed subjects. *Also, the attorney will be required to certify that he has examined the applicant on the subjects studied under his supervision, and that in his opinion the applicant has an adequate knowledge and understanding of the subjects.*

6. The required three years of study cannot be reduced by studying more than the minimum requirement of ten weeks per thirteen-week quarter.

7. The three-year course of study shall include all subjects prescribed by Rule 2 of the Rules of this Board. (see * below)

8. At no time may an attorney have more than two applicants studying under his supervision.

---

* The subjects on which applicants may be examined are Ethics; Conflict of Laws; Evidence; Pleading, Practice and Procedure (including Federal); Agency, Contracts; Property (Personal and Real); Sales, Torts; Creditors' Rights; Wills and Administration; Suretyship; Equity; Domestic and Other Personal Relations; Partnership; Trusts; Constitutional Law; Corporations (Municipal and Private); Criminal Law; Negotiable Instruments; Public Utilities; and Taxation (Virginia and Federal).

9. It is the applicant's responsibility to see that all reports are filed promptly.

10. *Applicants studying under attorneys who have previously attended approved law schools*: An applicant who has attended an approved law school will receive credit for work successfully completed, and need not study in the attorney's office longer than necessary to complete the three years of law study.

No credit, however, will be given for work successfully completed during periods of academic probation, unless the probationary period terminates with the student being reinstated to full academic status.

Credit shall be given for study in a law school in the proportion that the number of hours successfully completed bears to the number of hours required by such school for graduation; and the completion of one-third of such required hours shall be the equivalent of one year of study. Study in an attorney's office is based on a twelve-month calendar year. Scholastic years in law schools and calendar years in attorneys' offices are given equal credit.

11. Your attention is specifically directed to Section 54-60 through 54-66 of the Code of Virginia of 1950, as amended, and to the Rules of the Virginia Board of Bar Examiners.

12. All communications should be addressed to, and all certificates and forms filed with, W. Scott Street, III, Esquire, Secretary, P.O. Box 95, Richmond, Virginia 23201.

December, 1965

District of Columbia
Court of Appeals

No. January Term, 19

IN RE

EDWARD J. HICKEY, JR.

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack, and Ferren, Associate Judges.

ORDER

The Court has considered the special petition for a waiver of the Court's rules and petitioner's representation therein that "[O]n information and belief, petitioner avers that the ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement."

The American Bar Association Standards and Rules of Procedure, as amended - 1977, permit enrollment of persons in petitioner's category under Standard 506(ii) if they can satisfy the requirement for admission set forth in Standard 502. Accordingly, it is

ORDERED that petitioner's petition is denied.

PER CURIAM.

Copies to:

Edward J. Hickey, Jr.

Fred F. Fielding, Esquire
Wayne M. Lee, Esquire
1800 M Street NW, 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

Received
June 30, 1978
James F. Davey, Clerk

MARC FELDMAN,

Plaintiff,

—v.—

WILLIAM C. GARDNER, et al.,

Defendants.

PLAINTIFF'S INTERROGATORIES—FIRST SET

Plaintiff hereby requests that defendants in the above-captioned action answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following Interrogatories:

I.

DEFINITIONS

A. As used herein, the words "document" or "documents" include any written, printed, typed or graphic matter of any kind or nature, however produced or reproduced, now in the possession, custody or control of a defendant, or in the possession, custody or control of the present or former officers, agents, representatives, employees of a defendant or any and all persons acting in its or his behalf, including documents at any time in the possession, custody or control of such individuals or entities, or known by the defendants to exist.

B. As used herein, the words "identify", "identity", or "identification" when used in reference to a natural person mean to state his or her full name and present or last known address, and his or her present or last known position and business affiliation; when used in reference to a document

mean to state its date, its author, the type of document (e.g., letter, memorandum, telegram, chart, photograph, sound reproduction, etc.) or, if the above information is not available, some other means of identifying it, and its present location and the name of each of its present custodians. If any such document was but is no longer in your possession or subject to your control, or in existence, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition thereof and state the date or approximate date thereof.

C. The words "you" or "your" mean the defendants, their present and former members, officers, agents, employees, and all other persons acting or purporting to act on their behalf, including all present or former members, officers, agents, employees, and all other persons exercising or purporting to exercise discretion, making policy, and making decisions.

D. As used herein, the term "member of the District of Columbia Bar" shall include any person who (a) has been admitted to the bar of the defendant District of Columbia Court of Appeals since April 1, 1972; (b) who was a member of the bar of the United States District Court for the District of Columbia in good standing on April 1, 1972 and was admitted to the bar of the District of Columbia Court of Appeals pursuant to Section 11-2501 of the District of Columbia Code; or (c) who was a member of the bar of the United States District Court for the District of Columbia at any time prior to April 1, 1972.

E. As used herein, the term "District of Columbia bar examination" shall include (a) examinations for admission to the Bar of the District of Columbia Court of Appeals administered by the Committee on Admissions under the authority of that Court since April 1, 1972; and (b) examinations for admission to the Bar of the United States District Court for the District of Columbia administered by the Committee on Admissions and Grievances under the authority of the United

States District Court for the District of Columbia prior to April 1, 1972.

F. The term "law school approved by the American Bar Association" shall have the same meaning in these Interrogatories that it has been accorded by defendants in Rule 46 I of the defendant Court of Appeals Rules.

II.

INSTRUCTIONS

1. To the extent that information sought by any Interrogatory can be furnished by reference to the Answer furnished to another Interrogatory, appropriate reference will be acceptable to plaintiff. However, a separate answer should be accorded to each Interrogatory, and Interrogatories should not be joined together and accorded a common answer.

2. Each Answer should be preceded by identification and verbatim quote of the Interrogatory to which the Answer responds.

3. Each Interrogatory should be answered separately by each defendant. If an Interrogatory Answer provided by one defendant contains information responsive to an Interrogatory directed to another defendant, that defendant may incorporate such Answer by reference.

4. If any Interrogatory is objected to by you as inquiring into privileged matter, set forth fully in the objection the facts upon which you rely as the basis for your objection.

5. If any document, report, study, memorandum or other written material is withheld or not identified under claim of privilege, furnish a list identifying each such document for which the privilege is claimed, together with the following information: Date, author, sender, recipient, persons to whom copies were furnished, together with their jobs titles, subject matter of the document, the basis on which the asserted privilege is claimed, and the paragraph or paragraphs of these Interrogatories to which the document responds.

III.

INTERROGATORIES

1. Identify all persons who are now, or were formerly, members of the District of Columbia Bar and, at the time of their admission, had not graduated from a law school approved by the American Bar Association (A.B.A.). For each such person, provide the following information:

(a) The date when he or she was admitted to the D.C. Bar;

(b) The date(s) when he or she sat for the District of Columbia bar examination;

(c) If the person did not sit for the District of Columbia bar examination, the provision of law (*i.e.*, statute or court rule) on which his or her admission was based;

(d) A detailed description of the person's legal training and qualifications to practice law, specifically including but not limited to whether he or she attended law school, participated in a program of law office study, was admitted to the bars of others jurisdictions, served as the law clerk to a judge, or practiced law in other jurisdictions;

(e) A detailed description of the considerations on which the person's admission was based, including but not limited to whether the provisions of Rule 46 I of the Court of Appeals Rules requiring graduation from an A.B.A. approved law school were waived and, if so, for what reasons; and

(f) The identities of all documents which refer to, relate to, concern or reflect the circumstances surrounding the person's admission to the D.C. Bar, including but not limited to documents commenting on, evaluating or referring to his or her qualifications to practice law and documents reflecting the reasons why he or she was deemed qualified for admission.

2. Identify all persons who have sat for the District of Columbia bar examination and, at the time they took the examination, had not graduated from a law school approved by the American Bar Association. For each such person, provide the following information:

(a) The date(s) when he or she sat for the District of Columbia Bar examination;

(b) A detailed description of the person's legal training and qualifications to practice law, specifically including but not limited to whether he or she attended an unapproved law school, participated in a program of law office study, was admitted to the bars of other jurisdictions, served as the law clerk to a judge, or practiced law in other jurisdictions;

(c) A detailed description of the considerations on which the decision to allow the person to sit for the bar examination was based, including but not limited to whether the provisions of Rule 46 I of the Court of Appeals Rules requiring graduation from an A.B.A. approved law school were waived and, if so, for what reasons; and

(e) The identities of all documents which refer to, relate to, concern or reflect the circumstances surrounding the decision to permit the person to sit for the bar examination, including but not limited to documents commenting on, evaluating or referring to his or her qualifications to practice law and documents reflecting the reasons why he or she was deemed qualified for admission.

3. Has the defendant Court of Appeals issued any orders waiving the provisions of Rule 46 I to permit graduates of the International School of Law to sit for the District of Columbia Bar examination? If so, provide the following information:

(a) The dates when such orders were issued;

(b) A detailed description of the considerations on which these waivers of Rule 46 were based;

(c) The identities of the International School of Law graduates who have sat for the Bar examination pursuant to the Court's orders; and

(d) The identities of all documents which refer to, relate to, concern or reflect the granting of waivers of Rule 46 for International graduates, including but not limited to petitions for such waivers submitted by International graduates or students and any reports or memoranda prepared by or for defendants with respect thereto.

4. Have you, or the entities and individuals with responsibility for bar admissions in the District of Columbia prior to April 1, 1972, issued any orders or taken any other action to permit graduates of other law schools that have not been approved by the American Bar Association to sit for the District of Columbia Bar examination? If so, provide the following information:

(a) The dates of such orders or other actions;

(b) The considerations on which these orders or other actions were based;

(c) The identities of the law schools involved and the graduates thereof who have sat for the Bar examination pursuant to these orders or other actions; and

(d) The identities of all documents which refer to, relate to, concern or reflect a decision or contemplated decision to permit graduates of unapproved law schools to sit for the bar examination, including petitions seeking such permission submitted by graduates of unapproved law schools and any reports or memoranda prepared with respect thereto.

5. Identify all documents which refer to, relate to, concern or reflect plaintiff's application for admission to the District of Columbia Bar, his petition for a waiver of Rule 46, his legal training, or his qualifications to practice law.

6. Have you, or anyone acting on your behalf or under your supervision, made an independent examination of the quality of legal education provided at law schools approved by the American Bar Association? If such an examination was conducted, identify the date or dates when it occurred, the individuals who participated in it, and the conclusions in which it resulted. Identify any documents which refer to, relate to, reflect or concern such examination or the conclusions in which they resulted.

7. For each of the last ten years, how many applications have been submitted for admission to the District of Columbia bar?

8. For each of the last ten years, how many applications for admission to the District of Columbia bar have been submitted by persons who did not graduate from a law school approved by the American Bar Association? With respect to each of these applications, provide the following information:

(a) The identity of the person submitting the application;

(b) A detailed description of the person's legal training and qualifications to practice law;

(c) The disposition of the application, *i.e.*, whether it was granted or denied and, if so, on what date; and

(d) All documents that refer to, relate to, concern or reflect the application, including but not limited to documents reflecting the reasons for its disposition and documents commenting on or evaluating the qualifications of the applicant.

9. Identify all documents which refer to, relate to, concern or reflect the subject-matter areas that, in defendants' view, should be tested on the District of Columbia bar examination.

Submitted by,

Robert M. Sussman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6149

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

MARC FELDMAN,

Plaintiff,

—v.—

WILLIAM C. GARDNER, et al.,

Defendants.

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiff requests that the defendants make available for inspection and copying the documents described herein at a time and place to be arranged by counsel, but in no event later than thirty (30) days from the date of service of this request.

If a document is no longer in possession or subject to the control of defendants, state when such document was most recently in the possession of or subject to the defendants' control and what disposition was made of it. It documents have been destroyed, please identify when they were destroyed, the person who destroyed them, the person who directed that they be destroyed, the reason(s) for such action and any communications or documents which relate or refer to the destruction of the documents.

This request is continuing in character and requires defendants to provide any supplemental documents if, prior to trial, defendants should obtain any additional or supplemental documents which are responsive to this request.

DOCUMENTS TO BE PRODUCED

All documents identified or requested to be identified in the answers to the accompanying Plaintiff's Interrogatories—First Set, designating which interrogatory each document is responsive to.

Robert M. Sussman

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888 Sixteenth Street, N.W.
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(202) 452-6149

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Greene, J.
Civil Action
No. 78-1276
July 10 1978

EDWARD J. HICKEY, JR.
8548 Atwell Road
Potomac, Maryland 20854
(301) 340-9125

Plaintiff,

—v.—

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

THE HONORABLE JUDGES OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS:

Theodore R. Newman, Jr., Chief Judge
Catherine B. Kelly
John W. Kern, III
George R. Gallagher
Frank Q. Nebeker
Walter Yeagley
Stanley S. Harris
Julia Cooper Mack
John M. Ferren

500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-4392

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Edward J. Hickey, Jr., by his undersigned attorneys, herewith files his verified complaint and avers as follows:

1. Jurisdiction for this action is founded upon the Fifth Amendment of the United States Constitution; 28 U.S.C. §§ 1331, 1361, 2201 and 2202; and Sections 4 and 16 of the Clayton Act as amended, 15 U.S.C. §§ 15, 26.

2. Plaintiff is a 46 year-old citizen of Maryland and a graduate of the Potomac School of Law's class of 1978. However, as described more fully below, he has been denied permission to sit for the District of Columbia bar examination because he did not graduate from an American Bar Association ("ABA") accredited law school.

3. The Defendants are the District of Columbia Court of Appeals and the individual Judges thereof. The individual Judges are named as defendants in their official capacities. The District of Columbia Court of Appeals derives its jurisdiction from the District of Columbia Court Reform and Criminal Procedure Act of 1970, Title 11, District of Columbia Code. Under Section 11-2501 of the District of Columbia Code, the Court has comprehensive power to regulate the licensing of attorneys in the District. Rule 46 I of the Court of Appeals General Rules prescribes standards and procedures for admissions to the District of Columbia Bar.

FIRST CLAIM

4. Plaintiff entered upon his study of the law in March of 1975 after concluding a distinguished naval career. At the time of his retirement, Plaintiff had attained the rank of Commander, with 176 combat missions as a fighterpilot to his credit, and was a recipient of, among other awards, the Distinguished Flying Cross, the Vietnam Cross of Gallantry with Silver Star, and the Vietnam Cross of Gallantry with Palm Cluster.

5. Plaintiff had originally applied for admission to Georgetown University Law Center in the fall of 1973, and was placed on its waiting list in the spring of 1974. His application was ultimately denied, however, in August of 1974. Not having the luxury of time that a younger person might have, Plaintiff

entered the Potomac School of Law, a school originally licensed by the District of Columbia Board of Education (and now licensed by the Board of Trustees of the University of the District of Columbia), in March of 1975 rather than seeking admission elsewhere at a later date.

6. At the time Plaintiff enrolled at Potomac, he was aware of the fact that the school had not yet been approved by the American Bar Association, but thought that, if necessary, he could later transfer to an ABA-approved law school. Within weeks of his commencement of studies at Potomac, however, the International School of Law—at that time a new and unapproved law school located in the District of Columbia—petitioned the Defendants, the District of Columbia Court of Appeals, for a waiver of that court's Rule 46 I.(b)(3) requiring that applicants for the bar examination have "graduated from a law school that at the time of graduation was approved by the American Bar Association . . ." in order that its graduates might sit for the July 1975 bar examination. The 1976 and 1977 graduating classes of the International School of Law were also granted waivers by the Defendants and were permitted to sit for the bar examination.

7. Plaintiff thus fully anticipated being treated in the same manner as graduates of the International School of Law. This expectation was destroyed during Plaintiff's final year of law school when, on November 18, 1977, Defendants denied, without explanation, Potomac School of Law's Petition for Temporary Waiver of Rule 46 I.(b)(3). On the same date, Defendants granted waivers to students of the International School of Law who graduated before August, 1977, but stated that it would deny such waivers in the future.

8. On April 18, 1978, a Special Petition for a Waiver of District of Columbia Court of Appeals Rule 46 I.(b)(3) was filed on behalf of Plaintiff. (Attached hereto as Exhibit A.) In this Petition, the Defendants were made aware of Plaintiff's fine law school record. He served as a founding editor of the *Potomac Law Review*, participated in Potomac's Jessup Moot

Court Team, and was a member of the Delta Theta Phi National Law Fraternity. Accompanying the Petition were four affidavits of prominent members of the Bar of the District of Columbia (including two judges) which attested to Plaintiff's competence to sit for the bar examination. The Petition pointed out that, although future students of Potomac School of Law were put on notice by the Defendants' order of November 18, 1977 that they would not be permitted to sit for the bar examination unless the school receives its ABA approval by the time they graduate, it would be unfair to apply that Order to students currently enrolled at Potomac who have pursued three years of legal education in reliance upon the former policy of the Defendants. Such a rule, if applied to Plaintiff, would impose a particularly severe burden on him because of his age and the fact that he is currently unemployed and has a wife and two young children to support.

9. On June 12, 1978, Defendants denied Plaintiff's Petition without giving any consideration to Plaintiff's individual training and qualifications. The purported ground for the denial was that Plaintiff could comply with Rule 46 I.(b)(4) of the Rules of the District of Columbia Court of Appeals permitting an applicant who has graduated from a law school not approved by the ABA to sit for the examination after receiving 24 credit hours from a law school approved, at the time of study, by the ABA because the American Bar Association Standards and Rules of Procedure, as amended, "permit enrollment of persons in petitioner's category under standard 506(ii) if they can satisfy the requirement for admission set forth in standard 502." The Order denying Plaintiff's Petition is attached hereto as Exhibit B.

10. The above Order was entered despite the fact that Plaintiff had pointed out in his Petition that the relief provided by Rule 46 I.(b)(4) was illusory because no accredited law school in the District of Columbia was likely to admit Plaintiff for the necessary 24 credit hours. As can be seen from the affidavit of Plaintiff (attached hereto as Exhibit C), he has sought admission from every accredited law school in this

jurisdiction and been rebuffed at each attempt. In a letter from the Dean of Georgetown University Law Center, accompanying the affidavit, it is stated that it is not in the best interest of the law school to admit a graduate from a non-accredited school and thereby deviate from "not only the policies, but the most forceful positions of its accreditors." The letter from the Dean of Howard University Law School expresses the fear that if it admits students from Potomac, Howard may risk losing its own accreditation.

11. Defendants' refusal to permit Plaintiff to sit for the District of Columbia Bar Examination has violated Plaintiff's rights under the Fifth Amendment to the United States Constitution in the following respects:

(a) By limiting bar membership to graduates of an ABA accredited law school, Rule 46 I.(b)(3) creates an irrebutable presumption that only graduates of such law schools are fit to practice law in the District of Columbia and, thus, deprives persons who have pursued alternative methods of legal training of their property and liberty without due process of law;

(b) By limiting bar admission in the District of Columbia to graduates of an ABA accredited law school, Rule 46 I.(b)(3) impermissibly and irrationally discriminates against persons who have obtained equivalent legal training by other means and, thus, denies such persons the equal protection of the laws;

(c) By conclusively presuming that only graduates of an ABA accredited law school are fit to practice law in the District of Columbia, Rule 46 I.(b)(3) impermissibly delegates to the American Bar Association the Court of Appeals' power to regulate the practice of law and, hence, deprives persons with alternative legal training of their property and liberty without due process of law;

(d) By refusing to consider whether Plaintiff's individual qualifications and training were equivalent to graduation from an ABA accredited law school and for that

reason justified a waiver of Rule 46 I.(b)(3), the Defendants acted arbitrarily and capriciously and, accordingly, deprived Plaintiff of his liberty and property without due process of law;

(e) Because it and its predecessor courts have repeatedly waived the requirements of Rule 46 I.(b)(3) and permitted the admission of persons who did not graduate from ABA accredited law schools, the Court of Appeals' refusal to consider Plaintiff's individual qualifications and training was unreasonable and discriminatory and, accordingly, both denies Plaintiff the equal protection of the laws and deprived him of his liberty and property without due process of law.

SECOND CLAIM

12. Plaintiff incorporates herein by reference and re-avers the averments contained in paragraphs 4 through 11 above.

13. By limiting admission to the District of Columbia Bar to graduates of an ABA accredited law school, Defendants have unreasonably restricted entry into the legal profession and, thus, have entered into a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

14. By limiting admission to the bar to graduates of an ABA accredited law school, Defendants have attempted to monopolize, and have in fact created a monopoly over, the practice of law in the District of Columbia in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

15. Because Defendants' violations of the antitrust laws have prevented Plaintiff from pursuing his chosen profession, he has sustained injury to his business or property within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. a declaration (a) that Rule 46 I.(b)(3) of the Court of Appeals rules, either on its face or as applied to Plaintiff, is violative of the Fifth Amendment to the United States Constitution, (b) that Defendants' refusal to consider Plaintiffs' individual qualifications and training to practice law is a violation of Plaintiff's rights under the Fifth Amendment to the United States Constitution, and (c) that Defendants' rejection of Plaintiff's application for admission to the bar because he did not graduate from an ABA accredited law school constitutes a violation of the Federal antitrust laws;

2. an Order requiring Defendants to allow Plaintiff to sit for the District of Columbia bar examination at the earliest possible date;

3. such other and further relief as this Court deems just and equitable.

Respectfully submitted,

Fred F. Fielding
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3942

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD J. HICKEY, JR.
8548 Atwell Road
Potomac, Maryland 20854
(301) 340-9125

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

THE HONORABLE JUDGES OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Theodore R. Newman, Jr., Chief Judge
Catherine B. Kelly
John W. Kern, III
George R. Gallagher
Frank Q. Nebeker
Walter Yeagley
Stanley S. Harris
Julia Cooper Mack
John M. Ferren

500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-4392

Defendants.

Washington,
District of Columbia, ss:

AFFIDAVIT OF EDWARD J. HICKEY, JR.

I, EDWARD J. HICKEY, JR., having been duly sworn, depose and say:

1. On or about May 11, 1978 I asked Joseph F. English, Professor Emeritus, Catholic University Law School whether I could be admitted to Catholic University for the purpose of taking twenty-four credit hours to qualify to sit for the District of Columbia bar examination. After consulting the Dean of Catholic University Law School on my behalf, Professor English informed me that the law school would not permit admission of students from Potomac School of Law.

2. On June 22, 1978, I communicated to a Miss Lopez in the Admissions Office of the Antioch School of Law my desire to be admitted to that law school for the purpose of taking twenty-four credit hours to qualify to sit for the District of Columbia bar examination. Miss Lopez responded that Antioch accepts no special students and no part-time students and that all Antioch law students must take the full three-year program.

3. On June 22, 1978, I informed Mr. Joseph Salcetti of the George Washington University Law School that I wished to be admitted to that law school for the purpose of taking twenty-four credit hours to qualify to sit for the District of Columbia Bar examination. Mr. Salcetti told me that because I already have a law degree, I could be admitted to George Washington University Law School only in their Continuing Legal Education Department. I then contacted Ms. Marie Owen, Assistant to the Dean of Continuing Education, who informed me that because I graduated from a non-accredited law school, I am not eligible for admission to their program.

4. On March 31, 1978, Dean Wiley A. Branton of Howard University Law School was contacted on my behalf and informed that I wished to be admitted to that law school for the purpose of taking twenty-four credit hours in order to qualify to sit for the District of Columbia bar examination. A copy of the letter denying my request for admission is attached to this affidavit. As the letter states, Howard Law School fears it will lose its ABA accreditation if it admits students from Potomac School of Law.

5. On April 11, 1978, Dean David J. McCarthy of the Georgetown University Law Center was contacted on my behalf regarding my admission to the Law Center for the purpose of taking twenty-four credit hours in order to qualify to sit for the District of Columbia bar examination. On May 10, 1978, Dean McCarthy denied my request for admission; a copy of his letter of denial is attached to this affidavit. As that letter states, it has long been the policy of the Law Center to admit for post-J.D. education only graduates from accredited law schools. The Dean further states that it is not in the best interest of the law school to admit a graduate from a non-accredited school and thereby deviate from "not only the policies, but the most forceful positions of its accreditors."

6. On June 19, 1978, Professor Burke, Chairman of the Admissions Committee at American University Law School, informed me that, after consultation with the Dean and past chairmen of the Admissions Committee, he felt certain that my request for admission would be denied. Only if the Law School rules were amended, he told me, could I possibly be admitted and no decision on my admission could be expected until mid-November.

7. In Apr[il] of this year, I requested information from the Potomac School of Law as to efforts made by its administration to obtain permission from other law school for Potomac students to take courses for credit at these accredited schools. On April 14, I received a letter from Dean William D. Hurley informing me that he had requested that Catholic University Law School and Howard University Law School permit Potomac graduates to take up to 24 hours of credit in these law schools in order to qualify to take the District of Columbia bar

examination. These requests were denied. A copy of Dean Hurley's letter is attached.

S/ EDWARD J. HICKEY, JR.
Edward J. Hickey, Jr.

Sworn to and subscribed before
me this 7th day of July, 1978.

S/ CAROLE A. BROWNE
Notary Public
My Commission Expires: 7/31/78

(Letterhead of Howard University,
Washington, D.C.)

March 31, 1978

Dean William D. Hurley
Potomac School of Law
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

Dear Bill:

When the matter of your inquiry of January 30, 1978, regarding the opportunity for your school's graduates to take an additional 24 semester hours of law study in order that they could sit for the D. C. Bar examination was submitted to our Faculty, I was advised to seek the advice, sentiments and attitudes of the other area law schools and the accrediting agencies before making any response or decision in the matter.

After having discussed the matter with the various deans and the representatives of the accrediting agencies, it it my very unpleasant responsibility to inform you that we will not be able to accommodate your graduates in their quest to take the D. C. Bar examination. Although all the sources of my inquiry were personally sympathetic with the situation, they all felt that such accommodations would operate to jeopardize a school's accreditation standing. Inasmuch as we have been under close scrutiny by the accrediting agencies for the past six years, I do not feel we should exacerbate that circumstance by inviting and risking any criticism from that source, especially in my position as a newly-appointed dean. Consequently, in the interest of our own students, we must decline to accommodate the interests of your graduates, and we do so with a heavy heart.

Sincerely,

S/ WILEY
Wiley A. Branton
Dean

WAB:OM:pmr

(Letterhead of Georgetown University Law Center,
Washington, D.C.)

May 10, 1978

Mr. Kenneth F. Hickey
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Hickey:

Please pardon my delay in replying to your letter of April 11, 1978. I took the time to discuss the basic question here and with officials of the ABA and the Association of American Law Schools (accrediting agencies), as well as with other deans.

I am sympathetic to the thoughtful discussion in your letter of reasons for distinguishing your brother's situation from that of the multitude of similarly situated students who have sought similar assistance from us. I regret that I shall have to be the "nay-sayer." It has long been the policy of this school to admit by the admissions process and require the full program, to accept transfers only from accredited schools and to accept for post-JD education only from accredited school.

This policy is, as you can imagine, based upon a host of reasons which I shall not detail here. Permit me to summarize specifically those directly applicable. I do not think that it is in this school's best interests to deviate from not only the policies, but the most forceful positions of its accreditors. I do not think that wait-list status in our admissions process could serve to isolate the rare case. It is not in educations's best interest to ease the status or smooth the operation of unaccredited schools.

I regret the seeming inflexibility of my answer. But to the extent that it is a judgment call (and I'm not at all sure that I have any discretion), it is my conclusion that my responsibilities to this institution require a negative answer.

Sincerely,

s/ DAVID J. MCCARTHY
David J. McCarthy
Dean

(Letterhead of Potomac School of Law,
Washington, D.C.)

April 14, 1978

Mr. Edward Hickey
8548 Atwell Rd.
Potomac, Maryland 20854

Dear Mr. Hickey:

This is in response to your request for information relative to efforts made by Potomac's administration relative to Potomac's students being allowed to take courses for credit in other law schools.

Earlier this year requests were made of the Catholic University Law School and of Howard University Law School by the undersigned that Potomac graduates be allowed to take up to 24 hours of credit in these law schools in order that our graduates might fulfill the regulation of the D.C. Court of Appeals relating to eligibility of graduates of non-ABA approved law schools to sit for the District of Columbia bar examination. The said requests were denied.

Very truly yours,

s/ WILLIAM D. HURLEY
William D. Hurley
Dean

WDH:lh

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

—v.—

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

Defendants.

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff requests that the Defendants make available for inspection and copying the documents described herein at a time and place to be arranged by counsel.

If a document is no longer in possession or subject to the control of Defendants, state when such document was most recently in the possession of or subject to the Defendants' control and what disposition was made of it. If documents have been destroyed, please identify when they were destroyed, the person who destroyed them, the person who directed that they be destroyed, the reason(s) for such action and any communications or documents which relate or refer to the destruction of the documents.

The word "document," as used herein, means the original and all drafts of all written or graphic matter, however produced or reproduced, of any kind of description, whether or not sent or received, and all copies thereof which are different in any way from the original (whether by interlineation, receipt stamp, notation, indication of copy sent or received, or otherwise), including without limitation, any paper, book,

account, photograph, blueprint, drawing, sketch, schematic, agreement, contract, memorandum, press release, circular, correspondence, letter, telegram, telex, object, report, opinion, investigation, record, transcript, hearing, meeting, study, note, notation, working paper, summary, intra-office communication, diary, chart, minute index sheet, computer software, records or recording or summary of any telephone or other conversation, or of any interview, or of any conference, or any other written, recorded, transcribed, punched, taped, filmed or graphic matter of which the Defendants' have or have had possession, custody or control, or of which the Defendants' have knowledge.

This request is continuing in character and requires Defendants to provide any supplemental documents if, prior to trial, Defendants should obtain any additional or supplemental documents which are responsive to this request.

DOCUMENTS TO BE PRODUCED

All documents identified or requested to be identified in the answers to the accompanying Plaintiff's Interrogatories designating as to which interrogatory each document is responsive.

Fred F. Fielding
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5190

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(202) 872-5000

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

Filed Oct. 24, 1978
James F. Davey, Clerk

MARC FELDMAN,

Plaintiff,

v.

WILLIAM C. GARDNER, CHAIRMAN, COMMITTEE ON ADMISSIONS DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

ORDER

Upon consideration of defendants' motion to dismiss, plaintiff's opposition and defendant's reply thereto, and the Court having concluded that it lacks jurisdiction over the subject matter of this lawsuit, it is by the Court this 24th day of October, 1978,

ORDERED that defendants' motion to dismiss is hereby granted and plaintiff's complaint is hereby dismissed.

/s/ JUNE L. GREEN
June L. Green
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0957

MARC FELDMAN,

Plaintiff,

v.

WILLIAM C. GARDNER, CHAIRMAN, COMMITTEE ON ADMISSIONS DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

MEMORANDUM OPINION

Introduction

Plaintiff, Marc Feldman, instituted this action challenging the refusal of the D.C. Court of Appeals to waive its rules prescribing educational requirements for applicants to the bar on his behalf. Mr. Feldman, an attorney who has passed the Maryland and Virginia bars, did not attend law school but acquired legal training by working as an apprentice with a Virginia law firm, formally auditing courses at the University of Virginia, and clerking for the Honorable William Bryant, now Chief Judge of the District Court for the District of Columbia. He seeks a declaratory judgment that Rule 46 of the General Rules of the D.C. Court of Appeals, which provide that an applicant must be a graduate of a law school accredited by the American Bar Association, either on its face or as applied to plaintiff violates the Fifth Amendment of the Constitution, the Civil Rights Act (42 U.S.C. §§ 1981 *et seq.*), and the Sherman Act (15 U.S.C. §§ 1, 2). Plaintiff seeks an injunction requiring (i) that he be admitted to the bar forthwith without examination, or (ii) that he be permitted to sit for the bar examination or (iii) that the D.C. Court of Appeals and the

Committee on Admissions make an ad hoc determination whether his qualifications are equivalent to those applicants who have met the prescribed educational requirements.

On July 14, 1978, the defendants filed a motion to dismiss, based on lack of subject matter jurisdiction and res judicata. Upon consideration of defendant's motion, plaintiff's opposition and defendant's response thereto, the Court grants defendant's motion, and, as grounds therefor finds that this Court lacks jurisdiction over the subject matter of this lawsuit.

Discussion

The parties have recognized that the existence of subject matter jurisdiction turns on whether the order of the D.C. Court of Appeals denying plaintiff's petition for a waiver of Rule 46 represented a judicial determination which should have been appealed to the Supreme Court of the United States.

The Supreme Court in *In Re Summers,* 325 U.S. 561 (1945) clearly enunciated the standards to be applied in determining whether an action by a state's highest court is taken in response to an Article III case or controversy before that court.

> A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' [citations omitted] . . . A declaration on rights as they stand must be sought . . . and there must be an actual controversy over an issue. 325 U.S. at 566, 567.

The Court in *Summers* by applying these standards found that the action of the Illinois Supreme Court denying petitioner's application for admission to the bar was judicial and thus appealable to the Supreme Court. Although the Illinois Supreme Court asserted that its actions with respect to petitioner's application were ministerial, the Supreme Court in rejecting that argument stated:

> The form of the proceeding is not significant. It is the nature and effect which is controlling. *Id* at 567.

This Court, bound by *Summers* standards, must examine the facts and arguments that were presented to the D.C. Court of Appeals to determine if a case or controversy had developed to the extent that "the judicial power was capable of acting on it."

Plaintiff first applied for admission to the D.C. bar in November 1976. In January 1977 the Committee on Admissions advised him that his application was not acceptable because it was not accompanied by proof that he had graduated from an accredited law school as required by Rule 46. Subsequently plaintiff sought and was granted a hearing by the Committee on Admissions, where he presented his qualifications and responded to questions from committee members. In May 1977 the Committee rejected plaintiff's application on the same basis. In June 1977 plaintiff petitioned the D.C. Court of Appeals for admission to the D.C. bar and in March 1978 plaintiff's counsel wrote to the Court to urge them to either waive Rule 46 or allow him to sit for the July 1978 bar. On March 30, 1978 the Court *en banc* issued a per curiam order denying plaintiff's petition.

Plaintiff now argues that the March 1978 order merely reflects an administrative act by the D.C. Court of Appeals denying him an exemption from the rule. If this were the case then plaintiff would be on fairly strong jurisdictional footing because, as the Tenth Circuit[1] has indicated:

> . . . there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court. The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds that the state has unlaw-

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1 *Doe v. Pringle* 550 F.2d 596 (10th Cir. 1976).

> fully denied a particular applicant admission. The [District] Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority on the administration of the rules [citations omitted] *such is not true where review of a state court's adjudication of a particular application is sought.* 550 F.2d at 597.

See also *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 1969), aff'd. 401 U.S. 154 (1971); *Lipman v. Van Zant* 329 F. Supp. 391 (N.D. Miss. 1971); *Keenan v. Board of Law Examiners* 317 F. Supp. 1350 (E.D.N.C. 1970).

The Court finds that in the instant case, plaintiff did more than seek a Rule 46 waiver, which might otherwise have allowed him to invoke federal court jurisdiction, he in fact raised constitutional and statutory issues before the D.C. Court of Appeals. In a lengthy letter submitted by counsel, plaintiff challenged the validity of Rule 46 on its face and as applied, alleging violations of due process, equal protection and antitrust law.[2]

Therefore, in contrast to plaintiff's assertions that the D.C. Court of Appeals acted only in an administrative capacity in denying his petition, this Court finds that their *en banc* decision was a judicial order which fully encompassed the constitutional and statutory issues raised. If this Court were to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court. Congress explicitly denied such a position to this Court when it enacted the Court

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2 Plaintiff's arguments with respect to the due process and antitrust law violations were supported by citation to relevant case law. The equal protection argument was based on the Court's alleged arbitrary refusal to waive Rule 46 for plaintiff, while granting such waivers, until recently, for graduates of a local unaccredited law school.

Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970) and exclusively empowered the D.C. Court of Appeals with authority to prescribe rules for admission to the D.C. bar. As the Ninth Circuit noted in *MacKay v. Nesbitt,* 412 F.2d 846 (1969), *cert. denied,* 396 U.S. 960 (1969):

> . . . [T]he rule that orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court on certiorari to the state court, . . . serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars and between the state and federal judicial systems. We are persuaded that it is sound. 412 F.2d at 846.

Accordingly this Court concludes that this case must be dismissed. An appropriate order is entered herewith.

/s/ JUNE L. GREEN
June L. Green
United States District Judge

Date: Oct. 24, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

Received
Nov 17 1978
Morgan, Lewis & Bockius

EDWARD J. HICKEY, JR.,

Plaintiff,

—v.—

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

DEFENDANTS' RESPONSES TO PLAINTIFF'S INTERROGATORIES

Defendants hereby respond to Plaintiff's Interrogatories served October 24, 1978 as follows:

Interrogatory No. 1: Has the defendant Court of Appeals issued any orders waiving or refusing to waive the provisions of Rule 46 I to permit graduates of the International School of Law ("International") to sit for the District of Columbia Bar examination? If so, provide the following information:

(a) the dates when such orders were issued;

(b) a detailed description of the considerations on which waivers or denials of waivers of Rule 46 I were based;

(c) the identities of all documents which refer to, relate to, concern or reflect the granting or denial of waivers of Rule 46 I for International graduates, including but not limited to petitions for such waivers submitted by International, its graduates or students and any reports or memoranda prepared by or for defendants with respect thereto.

Response to Interrogatory No. 1: The D.C. Court of Appeals has issued orders waiving the provisions of Rule 46 I(b)(3) to permit certain graduates of the International School of Law who graduated prior to or in August, 1977 to sit for the D.C. Bar examination. The D.C. Court of Appeals has issued orders refusing to waive the provisions of Rule 46 I(b)(3) with respect to graduates of the International School of Law graduating after August, 1977.

(a) The waivers of Rule 46 I(b)(3) were issued as follows: by order of June 19, 1975; by letter of May 6, 1976 from Alexander Stevas to Dean Ralph Norvell; by order of January 13, 1977; by memorandum of July 11, 1977 from Alexander Stevas to the petitioning graduates; and by order of November 18, 1977. The order of November 18, 1977 stated that: "Any student of the International School of Law who graduates subsequent to August, 1977 shall only be permitted to take the D.C. bar examination provided the International School of Law at the time of graduation has received its accreditation from the American Bar Association as an approved law school." An order refusing to waive the provisions of Rule 46 I(b)(3) for a graduate receiving his degree subsequent to August, 1977 was issued on December 12, 1977.

(b) Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the grounds of privilege, in that the interrogatory seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they have reached certain decisions.

(c) Documents responsive to this interrogatory are identified in Exhibit A hereto, except for documents subject to the objections set forth in (b), *supra.*

Interrogatory No. 2: Have you, or the entities and individuals with responsibility for bar admissions in the District of

Columbia prior to April 1, 1972, issued any orders or taken any other action to permit graduates of other law schools that have not been approved by the American Bar Association ("ABA") to sit for the District of Columbia Bar examination? If so, provide the following information:

(a) the dates of such orders or other actions;

(b) a detailed description of the consideration of which these orders or other actions were based;

(c) the identities of the law schools involved; and

(d) the identities of all documents which refer to, relate to, concern or reflect a decision or contemplated decision to permit graduates of unapproved law schools to sit for the bar examination, including petitions seeking such permission submitted by graduates of unapproved law schools and any reports or memoranda prepared with respect thereto.

Response to Interrogatory No. 2: Defendants state that they have no personal knowledge of the matters inquired into with respect to the period prior to April 1, 1972. With respect to the period since April 1, 1972, defendants state that they have not issued any such orders or taken any such action, except to adopt Rule 46 I(b)(4).

Interrogatory No. 3: With regard to your denial on November 12, 1977 of Potomac School of Law's Petition for a Temporary Waiver of Rule 46 I (b)(3), provide the following information:

(a) a detailed description of the considerations on which this denial was based, and

(b) the identity of each communication relating in any way, either directly or indirectly to the Petition.

Response to Interrogatory No. 3: Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated

to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial act of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reached their decision.

Interrogatory No. 4: At the time you denied Potomac School of Law's Petition, did you also decide, either formally or informally, to deny all future requests by new law schools, unaccredited by the ABA, for waivers of Rule 46 I(b)(3) for members of their graduating classes regardless of the merits of the particular institution filing the Petition?

Response to Interrogatory No. 4: Defendants state that they did not so decide.

Interrogatory No. 5: If the answer to Interrogatory 4 is in the affirmative please provide:

(a) a detailed description of the considerations on which this decision was based;

(b) the identity of every communication relating in any way, either directly or indirectly to the Petition; and

(c) the identity of those participating in such decision and the (1) preliminary and (2) final decision taken by each individually.

Response to Interrogatory No. 5: Not applicable. See Response to Interrogatory No. 4 above.

Interrogatory No. 6: If the decision was made not to grant waivers in the future to the graduates of unaccredited law schools, did you consider what impact your decision would have on students already enrolled in unaccredited schools in the District of Columbia and who had relied on your past practice of granting waivers.

Response to Interrogatory No. 6: Not Applicable. See Response to Interrogatory No. 4 above.

Interrogatory No. 7: If the Answer to Interrogatory 6 is in the affirmative, provide the following information:

(a) a detailed explanation of the reasons why you decided not to permit students already enrolled in unaccredited schools in the District of Columbia to sit for the bar examination, and

(b) the identity of every communication relating in any way, either directly or indirectly, to the decision not to permit students already enrolled in unaccredited schools in the District of Columbia to sit for the bar examination.

Response to Interrogatory No. 7: Not applicable. See Response to Interrogatory No. 6.

Interrogatory No. 8: With regard to your denial, on June 12, 1978 of Plaintiff's Special Petition for a waiver of District of Columbia Court of Appeals Rule 46 I(b)(3), provide the following information:

(a) a detailed description of the considerations on which this denial was based;

(b) the identity of every communication relating in any way, either directly or indirectly to Plaintiff's Special Petition;

(c) the date or dates upon which this matter was discussed;

(d) the date the decision was made to deny Plaintiff's Special Petition;

(e) the identity of all those who participated in each discussion and the position taken by each participant in each discussion;

(f) the identity of all those whom you consulted concerning the matter other than named Defendants, including, but not limited to, representatives of law schools approved by the ABA, and representatives of the ABA;

(g) the identity of all those whom you are aware were consulted by other Defendants'; and

(h) the identity of all those who submitted reports on the matter, or who communicated with you in any way, either directly or indirectly, with respect to the matter.

Response to Interrogatory No. 8: Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial act of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reached their decision.

Interrogatory No. 9: Describe in detail all efforts made by you, or anyone acting on your behalf or under your supervision, to ascertain what the policy of the ABA is toward the admission of non-degree candidates to accredited schools for 24 credit hours for the purpose of complying with Rule 46 I(b)(4).

Response to Interrogatory No. 9: On April 26, 1978, Alexander L. Stevas, the Clerk of the D.C. Court of Appeals, on the instruction of the Court, wrote to Frederick R. Franklin, Staff Director, Section of Legal Education and Admissions to the Bar of the ABA, inquiring whether the ABA had issued instructions that approved law schools in the District of Columbia should deny admission to nondegree candidates for completion of the 24 credit hour requirement. Mr. Franklin replied to Mr. Stevas by letter of May 5, 1978, which also enclosed a pamphlet containing the Standards and Rules of Procedure for the Approval of Law Schools by the ABA. These documents speak for themselves and are being made available to plaintiff pursuant to his request for production of documents under Rule 34, Fed. R. Civ. P.

Interrogatory No. 10: Describe in detail all efforts made by you, or anyone acting on your behalf or under your supervision, to ascertain what the policy of the accredited law schools in the District of Columbia is toward the admission of non-de-

gree candidates for 24 credit hours for the purpose of complying with Rule 46 I(b)(4).

Response to Interrogatory No. 10: Defendants have not inquired into the said admissions policies of the accredited law schools in the District of Columbia.

Interrogatory No. 11: Identify all persons who have been permitted to sit for the District of Columbia bar examination and who have not graduated from a law school accredited by the American Bar Association since 1972. For each such person, identify all communications which refer or relate, either directly or indirectly, to the decision to permit such person to sit for the bar examination, and provide a full description of how that person's legal training and qualifications are superior to those of Plaintiff.

Response to Interrogatory No. 11: Defendants object to the second sentence of this interrogatory. This objection is made (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial acts of the D.C. Courts of Appeals to inquire into the mental or deliberative processes of the Judges of the Court and the manner in which they reached their decisions.

With regard to the first sentence of the interrogatory, such persons who were successful on the examination are identified in Exhibit B hereto. In addition, 71 persons were permitted to sit and were unsuccessful.

Interrogatory No. 12: Describe in detail the criteria presently applied when considering whether to grant a waiver of Rule 46 I(b)(3).

Response to Interrogatory No. 12: Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go

behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Interrogatory No. 13: If the criteria presently applied differs from those applied in the past, describe in detail every change in the criteria applied that has occurred since 1972.

Response to Interrogatory No. 13: Defendants state that they lack personal knowledge as to the criteria applied prior to 1972. Insofar as this Interrogatory seeks information for the period subsequent to 1972, defendants object on the same grounds stated in their response to Interrogatory No. 12.

Interrogatory No. 14: Identify all communications relating in any way, either directly or indirectly, to the discussion, consideration, adoption or rejection of past or present criteria for the waiver of Rule 46 I(b)(3).

Response to Interrogatory No. 14: Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Interrogatory No. 15: Have you, or anyone acting on your behalf or under your supervision, made an independent examination of the quality of legal education provided at law schools accredited by the American Bar Association? If such an examination was conducted, identify the date, or dates when it occured, the individuals who participated in it, and the conclusions in which it resulted. Identify any communications which refer to, relate to, reflect or concern such examination or the conclusions in which they resulted. If no such examination was

conducted, state why not, and identify any communications which in any way concern the decision not to make the examination.

Response to Interrogatory No. 15: Defendants rely on the ABA to make an independent examination of the quality of the legal education provided at law schools accredited by the ABA. Defendants object to the last sentence of this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that this sentence seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Interrogatory No. 16: Have you, or anyone acting on your behalf or under your supervision, made an independent examination of the quality of legal education provided at law schools not accredited by the American Bar Association? If such an examination was conducted, identify the date or dates when it occurred, the individuals who participated in it, and the conclusions in which it resulted. Identify any communications which refer to, relate to, reflect or concern such examination or the conclusions in which they resulted. If no such examination was conducted, state why not, and identify any communications which in any way concern the decision not to make the examination.

Response to Interrogatory No. 16: Defendants rely on the ABA to make an independent examination of the quality of the legal education provided at unaccredited law schools applying for ABA approval. Defendants object to the last sentence of this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that this sentence seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Interrogatory No. 17: Identify all communications between you or anyone acting on your behalf or under your supervision, and the ABA concerning its standards and procedures for the accreditation of law schools.

Response to Interrogatory No. 17: See answer to Interrogatory No. 9 and pamphlet containing Standards and Rules of Procedure for ABA approval of law schools there identified. A copy of this pamphlet is being provided pursuant to plaintiff's request under Rule 34 F. R. Civ. P.

Interrogatory No. 18: Describe in detail all formal or informal evaluations conducted by you, or by anyone acting on your behalf of under your supervision, of whether other alternatives to ABA accreditation are feasible for the evaluation of the competency of candidates to sit for the bar examination. Identify all communications relating in any way, either directly or indirectly to such evaluations.

Response to Interrogatory No. 18: Defendants object to this interrogatory (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Interrogatory No. 19: Describe in detail the factual basis for denying in your Answer the averment in paragraph 2 of the Complaint that Plaintiff has been denied permission to sit for the District of Columbia bar examination because he did not graduate from a law school accredited by the ABA.

Response to Interrogatory No. 19: Defendants Order of June 12, 1978 with respect to Plaintiff's Special Petition for a Waiver of the Court's Rules speaks for itself. To the extent that this Interrogatory seeks further explanation of that order,

defendants object (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial act of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reached their decision.

Interrogatory No. 20: Describe in detail the factual basis for the statement on paragraph 6 on your Answer that only "certain" graduates of the International School of Law were permitted to sit for the District of Columbia bar examination in 1976 and 1977.

Response to Interrogatory No. 20: Waivers were not granted to all graduates of International Law School for the 1977 examination but only to graduates who petitioned to take the examination. *See* response to Interrogatory No. 1.

Interrogatory No. 21: Describe in detail the factual basis for your denial of the averments contained in the third sentence of paragraph 7 of the Complaint.

Response to Interrogatory No. 21: Defendants Order of November 18, 1977 speaks for itself.

Interrogatory No. 22: Describe in detail the factual basis for your denial, with the exception of the fact that Plaintiff's Special Petition was denied on June 12, 1978, of the averments of paragraph 9 of the Complaint.

Response to Interrogatory No. 22: Defendants received and considered Plaintiff's Special Petition for Waiver of the Court's Rules. Plaintiff's characterization of the "purported" ground for the decision with respect to the Special Petition is incorrect. Defendants' Order of June 12, 1978 speaks for itself.

Interrogatory No. 23: Describe in detail the factual basis for your denial of the averments of the first sentence of paragraph 10 of the Complaint.

Response to Interrogatory No. 23: Plaintiff's Special Petition before the D.C. Court of Appeals speaks for itself. Defendants refer to said Petition for a complete statement of its contents. Defendants deny that Rule 46 I(b)(4) is illusory.

Respectfully submitted,

ARNOLD & PORTER

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Charles H. Cochran
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Defendants

Dated: November 16, 1978

EXHIBIT A

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
May 30, 1975	Petition of International School of Law for a Temporary Waiver of Rule 46I(b)(3)	Allen L. Lear	D.C. Court of Appeals
June 2, 1975	Letter requesting waiver of rules	Paul A. Cappello	Committee on Admissions to the D.C. Bar
June 3, 1975	Letter re application of Paul A. Cappello	John W. Brabner-Smith	Committee on Admissions to the D.C. Bar
April 28, 1975	Letter (draft) re award of J.D. Degree by International School of Law	John W. Brabner-Smith	W. Scott Street III
June 19, 1975	Order re temporary waiver of Rule 46I(b)(3)	D.C. Court of Appeals	NA
June 27, 1975	Letter re International graduates taking bar examination	Thomas W. Holland	Jacob A. Stein
June 30, 1975	Letter re submission of International School of Law	Jacob A. Stein	Thomas W. Holland
February 13, 1976	Letter requesting permission for International graduates to sit for July, 1976 bar examination	Ralph Norvell	Hon. Gerard D. Reilly
February 18, 1976	Petition of International School of Law for a Temporary Waiver of Rule 46I(b)(3)	George R. Grange II	D.C. Court of Appeals

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DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
February 18, 1976	Letter attaching copy of International's Petition of February 18, 1976	George R. Grange II	Jacob A. Stein
March 23, 1976	Letter re International Petition of February 18, 1976	Anthony Nigro	James P. White
March 23, 1976	Letter re International Petition of February 18, 1976	Anthony Nigro	Millard H. Ruud
April 20, 1976	Letter re admissions policy of International (with attachment)	David F. Condon	Charles J. Steele
April 20, 1976	Letter re International policy of communicating unaccredited status to students (with attachments)	J. Valerie Meigs	Charles J. Steele
March 31, 1976	Letter re International Petition of February 18, 1976	James P. White	Anthony Nigro
December 10, 1976	Petition to Sit for February, 1977 Bar Examination on behalf of International students unsuccessful on July, 1976 bar examination (with attachments)	Kennedy, Lashley, Riley, Fischler, Dougherty, Meyers, Goldstein, Guttman	D.C. Court of Appeals
December 10, 1976	Letter enclosing Petition of December 10, 1976	Salliann M. Dougherty	Edgar T. Ballinger

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
December 13, 1976	Letter forwarding Petition of December 10, 1976 to Jacob A. Stein	Edgar T. Bellinger	Salliann M. Dougherty
January 13, 1977	Order granting Petition of December 10, 1976	D.C. Court of Appeals	NA
January 13, 1977	Letter re Order of January 13, 1977	Anthony Nigro	International graduates who were unsuccessful on July, 1976 bar exam
May 7, 1977	Letter re summer 1976 bar exam and International graduates' performance on Virginia bar exam	George R. Grange	Charles T. Steele
May 7, 1977	Letter re summer 1976 bar exam and International graduates' performance on Virginia bar exam	George R. Grange	Anthony Nigro
May 7, 1977	Letter re summer 1976 bar exam and International graduates' performance in Virginia bar exam	George R. Grange	Alexander L. Stevas
May 6, 1977	Letter re Waiver of Rule 46I(b)(3) for current calendar year	Alexander L. Stevas	Ralph Norvell
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	Randy K. Dix
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	Jeffrey H. Kaufman

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	Donald J. Fingeret
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	William B. Newman, Jr.
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	J. Valerie Haigs
July 1, 1977	Letter re withdrawal of Petition for Waiver	Hugh E. Kline	Vincent T. Tanzola
July 11, 1977	Memorandum re Waiver of Rule 46I(b)(3)	Alexander L. Stevas	Addressees at International School of Law
November 18, 1977	Order respecting Waiver of Rule 46I(b)(3) for International graduates	D.C. Court of Appeals	NA
October 11, 1977	Letter re petition for Waiver of Rule 46I(b)(3)	Tomasean K. Buck	Anthony Nigro
October 11, 1977	Letter re docketing of petition for Waiver of Rule 46I(b)(3)	Tomasean K. Buck	Clerk, D.C. Court of Appeals
October 19, 1977	Letter attaching Petition for Waiver of Rule 46I(b)(3)	Stephen P. Zachary	Hon. Theodore R. Newman, Jr.
November 22, 1977	Letter re order permitting International graduates to sit for February, 1978 bar exam	Alexander L. Stevas	Lois J. Vermillion

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
December 6, 1977	Letter re request for waiver of rules	Alexander L. Stevas	Philip G. Kiko
December 7, 1977	Petition of Robert P. Remet for Exceptional Application of Order of November 18, 1977	Robert P. Remet	D.C. Court of Appeals
December 12, 1977	Order denying Petition for Waiver of Rule 46I(b)(3) on behalf of Robert P. Remet	D.C. Court of Appeals	NA
Undated	Petition of Michael L. Achem-Chen for Waiver of Rule 46I(b)(3)	Michael L. Achem-Chen	D.C. Court of Appeals
Undated	Petition of Jules B. Altman for Waiver of Rule 46I(b)(3)	Jules B. Altman	D.C. Court of Appeals
Undated	Petition of Kathleen Aram for Waiver of Rule 46I(b)(3)	Kathleen Aram	D.C. Court of Appeals
Undated	Petition of William J. Armstrong, III	William J. Armstrong,	D.C. Court of Appeals
May 31, 1977	Petition of William W. Bateman for Waiver of Rule 46I(b)(3)	William W. Bateman	D.C. Court of Appeals
June 13, 1977	Petition of John O. Behrens for Waiver of Rule 46I(b)(3)	John O. Behrens	D.C. Court of Appeals
May 27, 1977	Petition of Reginald H. Berry for Waiver of Rule 46I(b)(3)	Reginald H. Berry	D.C. Court of Appeals
Undated	Petition of Raymond G. Boorojian for Waiver of Rule 46I(b)(3)	Raymond G. Boorojian	D.C. Court of Appeals

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
October 11, 1977	Petition of Tomassean K. Buck for Waiver of Rule 46I(b)(3)	Tomassean K. Buck	D.C. Court of Appeals
Undated	Petition of Charles S. Carraccio, Jr. for Waiver of Rule 46I(b)(3)	Charles S. Carraccio, Jr.	D.C. Court of Appeals
June 9, 1977	Petition for Erin-Maura O'Malley Condon for Waiver of Rule 46I(b)(3) and Amendment to Petition	Erin-Maura O'Malley Condon	D.C. Court of Appeals
Undated	Petition of Robert H. Cushing for Waiver of Rule 46I(b)(3)	Robert H. Cushing	D.C. Court of Appeals
May 27, 1977	Petition of Randy K. Dix for Waiver of Rule 46I(b)(3)	Randy K. Dix	D.C. Court of Appeals
May 31, 1977	Petition of John T. Donelon for Waiver of Rule 46I(b)(3)	John T. Donelon	D.C. Court of Appeals
Undated	Petition of Jane L. Downey for Waiver of Rule 46I(b)(3)	Jane L. Downey	D.C. Court of Appeals
September 7, 1977	Petition of Dwight H. Ellis for Waiver of Rule 46I(b)(3)	Dwight H. Ellis	D.C. Court of Appeals
Undated	Petition of Diane L. Jansson for Waiver of Rule 46I(b)(3)	Diane L. Jansson	D.C. Court of Appeals
Undated	Petition of Mary K. Jolly for Waiver of Rule 46I(b)(3)	Mary K. Jolly	D.C. Court of Appeals

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
May 31, 1977	Petition of Jeffrey H. Kaufman for Waiver of Rule 46I(b)(3)	Jeffrey H. Kaufman	D.C. Court of Appeals
Undated	Petition of Dennis M. Kennedy for Waiver of Rule 46I(b)(3)	Dennis M. Kennedy	D.C. Court of Appeals
Undated	Petition of Philip G. Kiko for Waiver Rule 46I(b)(3)	Philip G. Kiko	D.C. Court of Appeals
Undated	Petition of Philip G. Kiko for Waiver of Rule 46I(c)(4) or Rule 46I(b)(3)	Philip G. Kiko	D.C. Court of Appeals
Undated	Petition of George K. Kohlmaier for Waiver of Rule 46I(b)(3)	George K. Kohlmaier	D.C. Court of Appeals
Undated	Petition of Michael Kostishak for Waiver of Rule 46I(b)(3)	Michael Kostishak	D.C. Court of Appeals
Undated	Petition of Michael I. Krensky for Waiver of Rule 46I(b)(3)	Michael I. Krensky	D.C. Court of Appeals
Undated	Petition of Lawrence C. Mawn for Waiver of Rule 46I(b)(3)	Lawrence C. Mawn	D.C. Court of Appeals
Undated	Petition of Eric G. Meyers for Waiver of Rule 46I(b)(3)	Eric G. Meyers	D.C. Court of Appeals
Undated	Petition of James E. Meyers for Waiver of Rule 46I(b)(3)	James E. Meyers	D.C. Court of Appeals
Undated	Petition of William B. Newman, Jr. for Waiver of Rule 46I(b)(3)	William B. Newman, Jr.	D.C. Court of Appeals

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
Undated	Petition of Lawrence P. Novak for Waiver of Rule 46I(b)(3)	Lawrence P. Novak	D.C. Court of Appeals
Undated	Petition of Joseph C. Paradiso for Waiver of Rule 46I(b)(3)	Joseph C. Paradiso	D.C. Court of Appeals
Undated	Petition of Esther K. Rogers for Waiver of Rule 46I(b)(3)	Esther K. Rogers	D.C. Court of Appeals
Undated	Petition of Terrence D. Ryan for Waiver of Rule 46I(b)(3)	Terrence D. Ryan	D.C. Court of Appeals
Undated	Petition of Michele A. Santucci for Waiver of Rule 46I(b)(3)	Michele A. Santucci	D.C. Court of Appeals
June 1, 1977	Petition of Michael Schaefer for Waiver of Rule 46I(b)(3)	Michael Schaefer	D.C. Court of Appeals
Undated	Petition of Mary M. Slappey for Waiver of Rule 46I(b)(3)	Mary M. Slappey	D.C. Court of Appeals
Undated	Petition of Vivienne S. Strauchen for Waiver of Rule 46I(b)(3)	Vivienne S. Strauchen	D.C. Court of Appeals
Undated	Petition of Vincent T. Tanzola for Waiver of Rule 46I(b)(3)	Vincent T. Tanzola	D.C. Court of Appeals
May 27, 1977	Petition of Ernest G. Trakas for Waiver of Rule 46I(b)(3)	Ernest G. Trakas	D.C. Court of Appeals

DATE	TITLE OR TYPE OF DOCUMENT AND SUBJECT MATTER	AUTHOR	ADDRESSEE
Undated	Petition of Darlyn J. Troy for Waiver of Rule 46I(b)(3)	Darlyn J. Troy	D.C. Court of Appeals
November 18, 1977	Petition of Lois J. Vermillion for Waiver of Rule 46I(b)(3)	Lois J. Vermillion	D.C. Court of Appeals
Undated	Petition of Michael G. Wechsler for Waiver of Rule 46I(b)(3)	Michael G. Wechsler	D.C. Court of Appeals
Undated	Petition of Angela S. Wilkes for Waiver of Rule 46I(b)(3)	Angela S. Wilkes	D.C. Court of Appeals
October 20, 1977	Petition of Stephen P. Zachary for Waiver of Rule 46I(b)(3)	Stephen P. Zachary (by Richard W. Galiher)	D.C. Court of Appeals
Undated	Petition of Anthony J. Zagami for Waiver of Rule 46I(b)(3)	Anthony J. Zagami	D.C. Court of Appeals

EXHIBIT B

ALTMAN, J.B.
ALTMAN, S.L.
ANDERS, J.W.
ARAM, K.
ARMSTRONG, S.A.
ARENJA, H.S.

BAKSHI, A.S.
BARRY, C.J.
BATEMAN, W.W.
BEPKO, T.J. Jr.
BETTAUR, R.H.
BROOKS, H. Jr.
BROOKS, I.H.
BRYANT, J.M.

CARROCCIO, C..S. Jr.
CHABRA, N.J.
CHANG, S.
CHEN, F.W.
CHUANG, K.H.J.
CONDON, E.M.
CONGDON, D.E.
COURTNEY, R.G.
CRAMER, A.B.
CRANDALL, D.L.
CROTTY, R.J.
CUSKING, R.H.

DACK, L.J.
DAL PRA, A.J.
DANIEL, R.T.
DARLAK, L.C.
DAUM, C.F.
DAVIES, J.G.
De PASS, D.V.G.
DIX, R.K.
DONNEY, J.L.

EASTON, J.D.
ELLIS, C.
ELLSWORTH, G.G.
ENGEBRETSEN, R.

FAULBAUM, O.J.
FIELSTRA, C.J.
FINDLER, W.E.
FISCHLER, A.K.

GOLDSTEIN, S.E.
GOTTSMAN, S.
GROSS, N.G.

HAHN, T.S.
HALDANE, M.E.
HALL, C.D.
HAMMON, G.D.
HEBBELER, R.J.
HICKEY, R.W.
HILLEGAS, J.M.
HOWELL, T.G.

ISMAIL, A.E.M.

KAUFMAN, J.H.
KELLEY, D.L.
KENNEDY, T.F.
KINCHAR, J.A.
KIRSER, P.H.
KIRO, P.G.
KNIGHT, W.T.
KOHLMAIER, G.K.
KRENSKY, M.I.

LASHLEY, D.L.
LEARY, J.F. Jr.
LEVINE, S.A.
LEWIS, G.C.
LIANG, C.E.
LIU, H.S.

McBRIER, C.R. Jr.
MAGEE, C.S. II
MARTOCCI, J.P. Jr.
METHA, P.A.
MEYERS, J.E.
MULLIN, K.G.

NAGASHIMA, T.
NEWMAN, W.B. Jr.

PARADISO, J.C.
PARK, S.W.
PELTON, B.D.

RASHAD, J.A.
REDMOND, F.W.
RILEY, P.J.
RUDE, R.A.
RYAN, T.D.

SANTUCCI, M.A.
SCHAEFER, M.
SEGEL, E.W.
SMITH, J.C.
SMITH, R.L.
SMOLEN, J.D.
SPARBER, F.A.
STRAUCHEN, V.S.
STERN, B.H.

TIDEWELL, D.V. III
TRAKAS, E.G.

VERMILLION, L.J.
VIDANA, L.H.
VIRGULAK, W.J. Jr.

WAITER, J.J
WALKER, B.A.
WAUGMAN, E.R. II
WECHSLER, M.G.
WEINBERG, D.C.
WESSEL, P.J.
WILKES, A.S.
WOMACK, C.G.J.
WORTZEL, A.H.

YANG, S.J.
YOUNG, D.J.

ZACHARY, S.P.
ZAGAMI A.J.
ZDROVKOVICH, D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

—v.—

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

RESPONSES OF DEFENDANTS TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Defendants District of Columbia Court of Appeals, *et al.* (hereinafter "defendants"), hereby respond to Plaintiff's Request for Admissions served October 24, 1978 as follows, without admitting the relevancy or admissibility in evidence of any of the matters contained herein:

Request 1. Defendants granted to the members of the 1975 graduating class of the International School of Law waivers of District of Columbia Court of Appeals Rule 46 I.(b)(3) requiring that applicants for the bar examination have "graduated from a law school that at the time of graduation was approved by the American Bar Association."

Response to Request 1. Defendants granted a waiver of Rule 46 I.(b)(3) permitting 1975 graduates of the International School of Law to sit for the July, 1975 D.C. bar examination only. No graduates of the International School of Law sat for the July 1975 D.C. bar examination.

Request 2. Defendants granted to the members of the 1976 graduating class of the International School of Law waivers of

District of Columbia Court of Appeals Rule 46 I.(b)(3) requiring that applicants for the bar examination have "graduated from a law school that at the time of graduation was approved by the American Bar Association."

Response to Request 2. Defendants granted a waiver permitting 1976 graduates of the International School of Law to sit for the July 1976 D.C. bar examination only.

Request 3. Defendants granted to the members of the 1977 graduating class of the International School of Law waivers of District of Columbia Court of Appeals Rule 46 I.(b)(3) requiring that applicants for the bar examination have "graduated from a law school that at the time of graduation was approved by the American Bar Association."

Response to Request 3. Defendants granted waivers to individual petitioning graduates of the International School of Law permitting them to sit for the July 1977 D.C. bar examination only.

Request 4. The International School of Law is no longer located in the District of Columbia.

Response to Request 4. Admitted.

Request 5. On November 18, 1977, Defendants denied Potomac School of Law's Petition for a Temporary Waiver of Rule 46 I.(b)(3).

Response to Request 5. Admitted.

Request 6. At the time Defendants denied Potomac School of Law's Petition; Defendants decided to deny all future requests by new, unaccredited law schools for waivers of Rule 46 I.(b)(3) for members of their graduating classes regardless of the merits of the case for waiver presented by the particular institution filing the Petition.

Response to Request 6. Denied.

Request 7. At the time Defendants denied Potomac School of Law's Petition, Defendants decided to deny all future requests by graduates and students of new, unaccredited law schools for waivers of Rule 46 I.(b)(3) regardless of the merits of the case for waiver presented by the particular graduate or student filing the petition.

Response to Request 7. Denied.

Request 8. Defendants' practice previous to 1977 had been to permit the first three years' graduating classes of a new law school located in the District of Columbia to sit for the bar examination even though the school was not yet approved by the ABA.

Response to Request 8. Denied.

Request 9. Defendants' change in practice was unrelated to any evaluation of the merits of Potomac School of Law as an institution of legal education.

Response to Request 9. Denied. See response to request 8.

Request 10. Defendants have no criteria for evaluating when a waiver of Rule 46 I.(b)(3) is appropriate.

Response to Request 10. Denied.

Request 11. By means of a Special Petition for a waiver of District of Columbia Court of Appeals Rule 46 I.(b)(3), filed on behalf of Plaintiff with Defendants on April 18, 1978, Defendants were made aware of Plaintiffs' law school record, and of the recommendations of four prominent members of the Bar of the District of Columbia (including two Superior Court Judges) to the effect that, in their minds, Plaintiff was qualified to sit for the bar examination.

Response to Request 11. Defendants admit that plaintiff filed a "Special Petition for a Waiver of District of Columbia Court of Appeals Rule 46 I.(b)(3)" on April 18, 1978 and state that the petition (attached as Exhibit A to plaintiff's complaint) speaks for itself.

Request 12. On or before April 18, 1978, Defendants were aware that those students currently enrolled and in their third year at Potomac School of Law had relied on the former actions of Defendants whereby students of at least one other unaccredited law school had been granted waivers of Rule 46 I.(b)(3).

Response to Request 12. Denied.

Request 13. The copy of the letter, dated March 31, 1978 from Wiley A. Branton, Dean of Howard University Law School to Dean William D. Hurley of Potomac School of Law, attached hereto as Exhibit A, is a true and accurate copy of that letter.

Response to Request 13. Admitted.

Request 14. The letter referred to in Request No. 13 is an accurate account of the substance of the communications to which reference is made therein.

Response to Request 14. Defendants state that they cannot admit or deny the matter set forth in this Request. Defendants were not present at or participants in the communications referred to in the letter, cannot ascertain whether the letter is an accurate account of the substance of the communications referred to therein, and put plaintiff to his proof on this point if there is any relevancy to the matter.

Request 15. The copy of the letter, dated May 10, 1978 from Dean David J. McCarthy of the Georgetown Law Center to Kenneth F. Hickey, attached hereto as Exhibit B, is a true and accurate copy of that letter.

Response to Request 15. Admitted.

Request 16. The letter referred to in Request No. 15 is an accurate account of the substance of the communications to which reference is made therein.

Response to Request 16. Defendants state that they cannot admit or deny the matter set forth in this Request. Defendants were not present at or participants in the communications referred to in the letter, cannot ascertain whether the letter is an accurate account of the substance of the communications referred to therein, and put plaintiff to his proof on this point if there is any relevancy to the matter.

Request 17. The copy of the letter dated April 14, 1978, from Dean William D. Hurley of Potomac School of Law to Edward Hickey, attached hereto as Exhibit C, is a true and accurate copy of that letter.

Response to Request 17. Admitted.

Request 18. The letter referred to in Request No. 17 is an accurate account of the substance of the communications to which reference is made therein.

Response to Request 18. Defendants state that they cannot admit or deny the matter set forth in this Request. Defendants were not present at or participants in the communications referred to in the letter, cannot ascertain whether the letter is an accurate account of the substance of the communications referred to therein, and put plaintiff to his proof on this point if there is any relevancy to the matter.

Request 19. The Defendants were made aware by the letters of the Deans of Georgetown University Law Center and Howard University Law School that the ABA had advised those schools of its position that accredited schools in the District of Columbia should deny admission to nondegree candidates seeking to comply with Rule 46 I.(b)(4) of the Defendants' Rules.

Response to Request 19. Denied.

Request 20. Other than stating in the Order of June 12, 1978 that the ABA Standards and Rules of Procedure "permit

enrollment of persons in petitioner's category," Defendants did not attempt to independently ascertain whether the ABA was opposed to the admission of nondegree candidates to accredited schools for the purpose of complying with Rule 46 I.(b)(4).

Response to Request 20. Denied.

Request 21. Defendants did not attempt to independently ascertain what the policy of the accredited schools in the District of Columbia was concerning the admission of nondegree candidates for the purpose of complying with Rule 46 I.(b)(4).

Response to Request 21. Defendants have not inquired into the said admissions policies of the accredited law schools in the District of Columbia.

Request 22. Defendants did not attempt to independently ascertain what the policy of the ABA was concerning the admission of nondegree candidates for the purpose of complying with Rule 46 I.(b)(4).

Response to Request 22. Denied.

Request 23. Accredited law schools within the District of Columbia will not admit nondegree candidates for 24 credit hours in order to comply with Rule 46 I.(b)(4).

Response to Request 23. Denied.

Request 24. Accredited law schools within the District of Columbia will not admit graduates of Potomac School of Law for 24 credit hours in order to comply with Rule 46 I.(b)(4).

Response to Request 24. Denied.

Request 25. Because accredited law schools within the District of Columbia will not admit nondegree candidates for 24 credit hours in order to comply with Rule 46 I.(b)(4), that Rule provides an illusory form of relief.

Response to Request 25. Denied.

Request 26. Because accredited law schools within the District of Columbia will not admit graduates of Potomac School of Law for 24 credit hours in order to comply with Rule 46 I.(b)(4), that Rule provides an illusory form of relief.

Response to Request 26. Denied.

Request 27. Rule 46 I.(b)(3) establishes an irrebuttable presumption that only those who graduate from a law school approved by the ABA are qualified to sit for the bar examination.

Response to Request 27. Denied.

Request 28. The percentage of graduates of law schools not approved by the ABA who have been permitted to take the bar examination, and have passed that examination, is approximately equal to the percentage of graduates of ABA approved law schools who have taken and passed the examination.

Response to Request 28. Denied.

Request 29. Defendants have not made an independent examination of the quality of legal education provided at law schools approved by the ABA.

Response to Request 29. Defendants state that they rely on the ABA to make an independent examination of the quality of legal education provided at law schools approved by the ABA.

Request 30. Defendants have not made an independent examination of the quality of legal education provided at law schools not approved by the ABA.

Response to Request 30. Defendants state that they rely on the ABA to make an independent examination of the quality of the legal education provided at unaccredited law schools applying for ABA approval.

Request 31. Defendants have concluded, without any independent examination of the quality of legal education provided

at law schools not accredited by the ABA, that only graduates of ABA approved law schools are qualified to sit for the bar examination in the District of Columbia.

Response to Request 31. Denied.

Request 32. Defendants did not consider whether Plaintiff's legal training and qualifications were equivalent to graduation from an ABA accredited law school and therefore justified a waiver of Rule 46 I.(b)(3).

Response to Request 32. Denied.

Request 33. Defendants have not conducted any formal evaluation of whether other alternatives of ABA accreditation exist for the evaluation of candidates to sit for the bar examination.

Response to Request 33. Defendants object to this Request (i) on the ground of relevance, in that the information requested does not appear reasonably calculated to lead to the discovery of admissible evidence, and (ii) on the ground of privilege, in that the interrogatory seeks to go behind the judicial acts of the D.C. Court of Appeals to inquire into the mental and deliberative processes of the Judges of the Court and the manner in which they reach their decisions.

Request 34. Defendants' practice concerning waivers and their acquiescence with the policy of the ABA and the accredited law schools in the District of Columbia not to permit graduates of nonaccredited schools to enroll for 24 credit hours, serves to restrict entry into the legal profession.

Response to Request 34. Denied.

Request 35. Defendants did not attempt to ascertain whether the ABA complies with its own published standards and rules of procedure.

Response to Request 35. Admitted. Defendants have no reason to believe that the ABA does not so comply.

Request 36. Defendants have not communicated to the ABA any comments concerning its procedures and standards for the accreditation of law schools.

Response to Request 36. Admitted.

Respectfully submitted,

ARNOLD & PORTER

Daniel A. Rezneck
Charles H. Cochran
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Defendants

Dated: November 16, 1978

CIVIL SUBPOENA

United States District Court

for the

District of Columbia

RECEIVED
NOV 30 1978
JAMES F. DAVEY, Clerk

Edward J. Hickey, Jr.
Plaintiff.

vs.

CIVIL ACTION No. 78-1276

District of Columbia Court of Appeals, et al.,
Defendant.

To: Wiley A. Brampton

YOU ARE HEREBY COMMANDED to appear in ~~this court~~ (the office of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036)

to give testimony in the above-entitled cause on the 30th day of November 19 78, at 1:00 o'clock p.m. (and bring with you) the documents described in the attached Addendum.

and do not depart without leave.

JAMES F. DAVEY, *Clerk*

By Robert L. Lee
Deputy Clerk.

Date November 22, 1978

Michael F. Healy

Michael F. Healy *Attorney for* { *Plaintiff.* ~~Defendant~~

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to him and tendering to him the fees for one day's attendance and mileage allowed by law, on the 22nd day of November 19 78 at 12:30 p.m.

Dated Nov. 30, 1978

William Barnes

Subscribed and sworn to before me, a Notary Public this 30th day of November 19 78

Frances A. Burke

My Commission expires October 14, 1981

NOTE—Affidavit required only if service is made by a person other than a United States marshal or deputy marshal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT
OF APPEALS, et al.,

ADDENDUM TO CIVIL SUBPOENA TO
Wiley A. Branton

a) all documents, upon which you intend to rely in your testimony;

b) all documents referring in any way, either directly or indirectly, to communications between you (or anyone else associated with Howard University Law School) and other law schools or accrediting agencies relating to:

1) whether to admit graduates of unaccredited law schools who sought to take 24 credit hours in order to comply with Rule 46 I.(b)(4) of the Rules of the District of Columbia Court of Appeals;

2) whether to admit Edward J. Hickey for 24 credit hours so that he might comply with Rule 46 I.(b)(4) of the Rules of the District of Columbia Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT
OF APPEALS, et al.,

NOTICE OF DEPOSITION

TO: Daniel Rezneck, Esquire
Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff will take the oral deposition of Wiley A. Branton before a notary public on Thursday, November 30, 1978 at 1:00 p.m. and thereafter from day to day until completed, at the offices of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. Defendant requests that deponent bring to said deposition all documents described in the attached ADDENDUM to Civil Subpoena.

Fred F. Fielding
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3942

OF COUNSEL:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

CIVIL SUBPOENA

United States District Court

for the

District of Columbia

RECEIVED
NOV 30 1978
JAMES F. DAVEY, Clerk

Edward J. Hickey, Jr.
Plaintiff.

vs.

CIVIL ACTION No. 78-1276

District of Columbia Court of Appeals, et al.,
Defendant.

To: David J. McCarthy

YOU ARE HEREBY COMMANDED to appear in (this court) (the office of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036)

to give testimony in the above-entitled cause on the 30th day of November, 19 78,

at 3:00 o'clock _ m. (and bring with you) the documents described in the attached Addendum

and do not depart without leave.

JAMES F. DAVEY, *Clerk*

By Robert L. Lewis
Deputy Clerk.

Date November 22, 1978

Michael F. Healy

Michael F. Healy *Attorney for* { *Plaintiff.* / *Defendant.*

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h im and tendering to h im the fee for one day's attendance and mileage allowed by law, on the 22nd day of November 19 78, at 1:20 p.m.

Dated Nov 30, 1978

William Bowers

Subscribed and sworn to before me, a Notary Public this 30th day of November, 19 78

Notary Public

October 14, 1981

Note.—Affidavit required only if service is made by a person [illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

ADDENDUM TO CIVIL SUBPOENA TO
David J. McCarthy

a) all documents, upon which you intend to rely in your testimony;

b) all documents referring in any way, either directly or indirectly, to communications between you (or anyone else associated with Georgetown University Law Center) and other law schools or accrediting agencies relating to:

1) whether to admit graduates of unaccredited law schools who sought to take 24 credit hours in order to comply with Rule 46 I.(b)(4) of the Rules of the District of Columbia Court of Appeals;

2) whether to admit Edward J. Hickey for 24 credit hours so that he might comply with Rule 46 I.(b)(4) of the Rules of the District of Columbia Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

NOTICE OF DEPOSITION

TO: Daniel Rezneck, Esquire
Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff will take the oral deposition of David J. McCarthy before a notary public on Thursday, November 30, 1978 at 3:00 p.m. and thereafter from day to day until completed, at the offices of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. Defendant requests that deponent bring to said deposition all documents described in the attached ADDENDUM to Civil Subpoena.

Fred F. Fielding
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3942

OF COUNSEL:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

United States District Court
for the
District of Columbia

Edward J. Hickey, Jr.
Plaintiff.

vs. CIVIL ACTION No. 78-1276

District of Columbia Court of Appeals, et al.,
Defendant.

RECEIVED
DEC 15 1978
JAMES F DAVEY Clerk

To: Oliver Morse

YOU ARE HEREBY COMMANDED to appear in (this court) (the office of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036) to give testimony in the above-entitled cause on the 13th day of December, 19 78, at 10:00 o'clock a. m. (and bring with you) the documents described in the attached Addendum

and do not depart without leave.

JAMES F. DAVEY, *Clerk*

By Robert L. Lewis
Deputy Clerk.

Date December 5, 1978

Michael F. Healy

Michael F. Healy *Attorney for* { *Plaintiff.* *Defendant.*

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to his office for him and tendering to him the fees for one day's attendance and mileage allowed by law, on the 6th day of December, 19 78, at 4:30 p.m.

Dated 12/15/78

Rodger White

Subscribed and sworn to before me, a Notary Public this 15th day of December, 1978.

Jeanne L. Rawles
Notary Public, District of Columbia
My Commission Expires 10/14/81

NOTE.—Affidavit required only if service is made by a person other than a U.S. Marshal or his deputy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT
OF APPEALS, et al.,

Defendants.

ADDENDUM TO CIVIL SUBPOENA TO
Oliver Morse

a) all documents, upon which you intend to rely in your testimony;

b) all documents referring in any way, either directly or indirectly to communications between you and any other person (whether connected with Howard University Law School or not) relating to whether to admit graduates or students of any unaccredited law school for study at an accredited law school.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

Defendants.

NOTICE OF DEPOSITION

TO: Daniel Rezneck, Esquire
Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff will take the oral deposition of Oliver Morse before a notary public on Tuesday, December 12, 1978 at 10:00 a.m. and thereafter from day to day until completed, at the offices of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. Defendant requests that deponent bring to said deposition all documents described in the attached ADDENDUM to Civil Subpoena.

Fred F. Fielding
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3942

OF COUNSEL:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

Defendants.

NOTICE OF DEPOSITION

TO: Daniel Rezneck, Esquire
Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff will take the oral deposition of Alexander Stevas before a notary public on Friday, December 22, 1978, at 10:00 a.m. and thereafter from day to day until completed, at the office of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D. C. Defendant requests that deponent bring to said deposition all documents upon which he intends to rely in his testimony.

Fred F. Fielding
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-3942

OF COUNSEL:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-5000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

EDWARD J. HICKEY, JR.,

Plaintiff,

vs.

DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,

Defendants.

NOTICE OF DEPOSITION

TO: Daniel Rezneck, Esquire
Arnold & Porter
1229 19th Street, N.W.
Washington, D. C. 20036

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff will take the oral deposition of Charles Maechling, Jr., before a notary public on Friday, December 22, 1978, at 9:30 a.m. and thereafter from day to day until completed, at the office of Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D. C. Defendant requests that deponent bring to said deposition all documents upon which he intends to rely in his testimony.

Fred F. Fielding
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-5190

Michael F. Healy
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-3942

OF COUNSEL:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036
(202) 872-5000

Exhibit A

March 23, 1976

Professor Millard H. Ruud
Executive Director
Association of American Law Schools
One Dupont Circle, N. W.
Washington, D. C. 20038

Dear Professor Ruud:

In June of 1975 Mr. Holland requested the Committee on Admissions that copies of any pleadings filed with the D.C. Court of Appeals by the representatives of International School of Law be made available to the Association of American Law Schools.

On February 18, 1976 International submitted the enclosed petition to the Court which is provided for your information. The Court has requested the Committee's recommendation regarding this petition.

Accordingly, if you have any comments which may assist the Committee in its recommendation, please feel free to express them.

Thank you for your assistance in this matter.

Very truly yours,

ANTHONY NIGRO
Secretary

Enclosure

AN/jlk

Exhibit B

(Letterhead of Association of American Law Schools,
Washington, D.C.)

June 27, 1975

Jacob A. Stein, Esquire
Chairman, Committee on Admissions
District of Columbia Bar
The Ring Building
Washington, D.C. 20036

Dear Mr. Stein:

I was very pleased to talk with you on Thursday regarding the order by the District of Columbia Court of Appeals permitting the June graduates of the International School of Law to sit for the D.C. Bar Examination in July.

As I indicated, Professor Ruud, the Association's Executive Director and I would be most pleased if you could provide us with copies of the court order and any petitions or papers which were filed with the Court by the representatives of the International School of Law. We have a keen interest in the development of quality legal education in the country and we intend to moniter the development of the International School of Law.

Very truly yours,

s/ THOMAS W. HOLLAND
Thomas W. Holland
Assistant Executive Director

Received
Committee on Admissions
Jul 1 1975

Exhibit C

(Letterhead of Stein, Mitchell & Mezines,
Washington, D.C.)

June 30, 1975

Thomas W. Holland
Assistant Executive Director
Association of American Law Schools
Suite 370, One Dupont Circle, N. W.
Washington, D. C. 20036

Dear Mr. Holland:

I have asked Mr. Nigro to make available to you for copying the submission of the International School of Law.

In the near future I would like to talk with you about mutual problems which arise.

I will give you a call.

Sincerely yours,

Jacob A. Stein

CC: Anthony Nigro, Secretary
Committee on Admissions

Received
Committee on Admissions
Jul 1 1975

Exhibit D

March 23, 1976

Dean James P. White
Indiana University
Indianapolis Law School
Indianapolis, Indiana 46202

Dear Dean White:

The International School of Law has filed with the District of Columbia Court of Appeals the enclosed petition. The Court has requested the Committee's recommendation regarding this petition.

Please feel free to express any comments you may have which may assist the Committee on Admissions in its recommendation.

Thank you for your assistance in this matter.

Very truly yours,

Anthony Nigro
Secretary

Enclosure

AN/jlk

Exhibit E

(Letterhead of American Bar Association,
Chicago, Illinois)

March 31, 1976

Mr. Anthony Nigro
Secretary
District of Columbia Court of Appeals
400 F Street, Northwest
Washington, D. C. 20001

Dear Mr. Nigro:

I am responding to your letter of March 23, 1976 in which you indicate that the International School of Law has filed with the District of Columbia Court of Appeals, a petition for a temporary waiver of Rule 46 I (b)(3) to permit graduating students of this school to sit for the July, 1976 District of Columbia Bar Examination. You indicated that the District of Columbia Court of Appeals has requested the recommendation of its Committee on Admissions in this matter. You also report that the petition has been filed since the International School is not an Approved Law School by the American Bar Association and that the relevant part of the Rules of the District of Columbia relevant to applications for bar examination requires that the applicant must have "graduated from a law school that the time of the graduation was approved by the American Bar Association. . . .".

The International School of Law has indicated that it will not be approved by the American Bar Association in July of 1976, hence, the reason for its petition. I note that the petition has an error on its first page in that it mis-states that it is a petition for the graduating students to sit for the July 1977 District of Columbia Bar Examination. Perusal of the petition will indicate however, that it is a 1976 examine for which such waiver has been requested.

Since 1921 the position of the American Bar Association has been that only graduates of American Bar Association Ap-

proved Schools should be permitted to sit for bar examinations in each of the several admitting jurisdictions. As you know, the vast majority of American admitting Jurisdictions have adopted this requirement. We believe they have adopted it for good reason and because of the committment of the American Bar Association for a minimum level of quality in legal education.

Our position since 1921 has been that graduates of schools not approved by the American Bar Association should not be permitted to sit. In recent years, with the development of some new law schools, this has become a more acute problem. It has become a more acute problem because many of these schools have commenced without adequate consultation with the American Bar Association, and upon their application and subsequent inspection are found to be totally lacking any substantial compliance with the Rules of Procedure for the Approval of Law Schools by the American Bar Association. Such was the case of the International School of Law when it was inspected this past year. Subsequent to the inspection, Dean Ralph Norval, a noted legal educator, was appointed its Dean. Dean Norval and I have not communicated in any specific way since his appointment as Dean of the School of Law. I have no knowledge of developments that have taken place at the School of Law. My position, which has been the traditional position of the American Bar Association, is that graduates of unapproved schools should not be permitted to sit for bar examinations.

If I can furnish you any different additional information, please do not hesitate to contact me.

Sincerely yours,

S/ JAMES P. WHITE
James P. White
Consultant on Legal Education
to the American Bar Association

JPW/bk

Received
Committee on Admissions
Apr 5 1976

Exhibit F

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Alexander L. Stevas
Clerk of the Court

Telephone 727-1800
Area Code 202

April 26, 1978

Frederick R. Franklin, Staff Director
Section of Legal Education and
Admissions to the Bar
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Dear Mr. Franklin:

The Court has instructed me to make formal inquiry of you respecting an allegation made by a petitioner who is seeking to be admitted to the Bar of this Court as a graduate from a non-ABA approved law school. The petitioner, who attended Potomac School of Law (non-ABA approved), has indicated that ". . . the ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement."

The rules of this Court provide that a graduate from a non-ABA approved law school may sit for the District of Columbia bar examination if the applicant has attended an ABA-approved law school and earned 24 semester hours. The petitioner is alleging that the ABA's instruction is preventing him from complying with the 24 semester hour requirement.

Can you please inform me whether or not the American Bar Association has issued such instructions? Your response for the use of the Court in acting upon the pending petition will be appreciated.

Sincerely,

S/ ALEXANDER L. STEVAS
Alexander L. Stevas
Clerk

Exhibit G

(Letterhead of American Bar Association,
Chicago, Illinois)

May 5, 1978

Alexander L. Stevas, Clerk
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Stevas:

This is in reply to your letter of April 26, 1978 requesting information about ABA Standards for the Approval of Law Schools pertaining to enrollment of non-degree candidates in ABA-approved law schools.

Enclosed for your information is a pamphlet containing the Standards and Rules of Procedure for the Approval of Law Schools by the American Bar Association.

Please note Standard 506 which governs enrollment of non J.D. degree candidates. Among other things, it permits the enrollment in a limited number of courses of non-degree candidates who are students enrolled in other colleges, members of the bar, graduates of other approved law schools, or other persons who have successfully completed at least three years toward a bachelor's degree at a regionally accredited college or university.

The petitioner referred to in your letter may qualify under Standard 506 (ii) if he is a "person satisfying the requirements for admission set forth in Section 502."

Of course, Standard 506 does not require a law school to accept non-degree candidate students. A law school may decide to limit its enrollment for several legitimate reasons. For example, the school may wish to have a low student/teacher ratio, in order to promote dialogue between teacher and

student and among students, and therefore may decide not to permit enrollment of any auditors or other non-degree candidates. A law school may decide to limit enrollment of non J.D. degree candidates to those who are pursuing some other degree or an advanced degree. Several of the ABA-approved law schools in the District of Columbia have some form of Masters of Law degree program.

If you need any additional information, or further clarification, please let me know.

Sincerely,

s/ FRED FRANKLIN
Frederick R. Franklin

FRF:wp
Enclosures

cc: Legal Education Section Officers and
Dean James P. White

P.S. We believe the ABA Standards for the Approval of Law Schools establish the minimum requirements needed for a quality legal education. Enclosed for your information is a copy of an *amicus curiae* brief recently filed in behalf of the ABA in the Supreme Court of Minnesota.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1276

Filed
Dec. 21, 1978
James F. Davey,
Clerk

EDWARD J. HICKEY, JR.,

Plaintiff,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Defendants.

MEMORANDUM ORDER

This is an action to compel plaintiff's admission to the District of Columbia Bar examination notwithstanding his failure to comply with Rule 46(I) (b) (3) of the Rules of the District of Columbia Court of Appeals, which requires graduation from an American Bar Association (ABA) accredited law school, and to declare that Rule unconstitutional.

Plaintiff is a 46-year old Maryland citizen and a graduate of the Potomac School of Law, which has not been accredited by the ABA. On April 18, 1978, plaintiff petitioned the District of Columbia Court of Appeals for a waiver of Rule 46(I) (b) (3) in his case. On June 12, 1978, the Court denied the petition by an *en banc* order.[1] Plaintiff did not appeal that order. Instead, on July 10, 1978, he filed the instant complaint seeking a declaratory judgment that defendants' refusal to allow him to sit for the examination violates both the Fifth Amendment to the Constitution and the federal antitrust laws, and an injunction ordering defendants to allow plaintiff to take the examina-

1 The Court noted that if plaintiff were to complete 24 credit hours as a non-degree candidate in an approved law school, he would be eligible to sit for the examination.

tion. On July 21, 1978, this Court denied plaintiff's application for a preliminary injunction relating to the District of Columbia Bar examination administered on July 26 and 27, 1978. Presently before the Court is the motion of defendants to dismiss the complaint for lack of subject matter jursidiction.

It is well settled that the admission and exclusion of attorneys by the members of the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court. *In re Summers,* 325 U.S. 561 (1945); *Ex parte Garland,* 71 U.S. 333, 378-79 (1866); *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977); *McKay* v. *Nesbett,* 412 F.2d 846 (9th Cir. 1969); *Jones* v. *Hulse,* 391 F.2d 198 (8th Cir. 1968); *Feldman* v. *Gardner,* C.A. No. 78-0957 (D.D.C. Oct. 24, 1978). Plaintiff's argument that this case is properly before this Court as a broad constitutional attack on defendants' "rulemaking authority or the administration of the rules," as distinguished from a "review of a state court's adjudication of a particular application" (*Doe* v. *Pringle, supra,* 550 F.2d at 597), must fail.

However the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of defendants' denial of his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case. In view of that circumstance, there is no basis for the extraordinary attempt to invoke the jurisdiction of this Court on a matter entrusted by the Congress to the D.C. Court of Appeals.

It is also clear that, had plaintiff raised the issues concerning the validity of Rule 46 before the D.C. Court of Appeals in the context of the proceeding he brought there, that court could and would have entertained and determined them. *Harper* v. *District of Columbia Committee on Admissions,* 375 A.2d 25

(D.C. 1977). Had that course been followed, this Court would have been precluded in any event from thereafter entertaining those same issues. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977). This Court has been informed through counsel for defendants that the D.C. Court of Appeals is still willing to consider those matters at this juncture. It would be a violation of the principles of comity and judicial economy in these circumstances for this Court to exercise jurisdiction even if such jurisdiction exists.

Plaintiff's second claim—that defendants' action violated the antitrust laws—must likewise be dismissed, for the antitrust laws do not apply to the kind of action being challenged. *Parker* v. *Brown*, 317 U.S. 341 (1943); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

Accordingly, it is this 21st day of December, 1978,

ORDERED That defendants' motion to dismiss for lack of jurisdiction be and it is hereby granted, and it is further

ORDERED That the instant complaint be and it is hereby dismissed.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

December 21, 1978

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1335

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, *et al.*

Petitioners,

v.

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

BRIEF OF RESPONDENT MARC FELDMAN IN OPPOSITION

ROBERT M. SUSSMAN
JAMES A. TOUPIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Respondent

February 16, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Where the District of Columbia Court of Appeals has promulgated a rule governing bar admissions, may respondent bring suit in federal district court challenging that rule's constitutionality after he has requested the District of Columbia Court of Appeals to waive the operation of the rule in an exercise of its administrative discretion?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1335

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, *et al.*

Petitioners,

v.

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

BRIEF OF RESPONDENT MARC FELDMAN IN OPPOSITION

Respondent Marc Feldman urges this Court to deny the petition by the District of Columbia Court of Appeals ("D.C. Court of Appeals") and its judges for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

STATEMENT OF THE CASE

A. Facts

Marc Feldman, respondent in this case,[1] chose to obtain a legal education by pursuing a program of law office study rather than attending law school. The program he pursued was authorized by the Virginia Code, under which persons may qualify

[1] This account of the prior facts and proceedings addresses only Mr. Feldman's case and leaves to the brief filed on behalf of Edward J. Hickey, Jr. an account of the companion case.

for admission to the Virginia Bar by completing a course of law office study in accordance with guidelines prescribed by the Virginia Board of Bar Examiners. Va. Code § 54-62 (1978). To augment the training he obtained from this program, Mr. Feldman audited courses at the University of Virginia School of Law, clerked for a federal district court judge, and attended professional symposia. [2]

After completing his apprenticeship, Mr. Feldman took and passed the Virginia bar examination and was admitted to the Virginia Bar. He then took and passed the Maryland bar examination, subsequently becoming a member of the Maryland Bar as well. For eight months, he worked as a staff attorney with the Baltimore Legal Aid Bureau. App. 9a.

Mr. Feldman then became associated with an attorney practicing in the District of Columbia and applied for admission to the District of Columbia Bar. On May 11, 1977, however, the Committee on Admissions advised him that his application for admission to the Bar had been rejected on the basis of Rule 46 I(c) of the D.C. Court of Appeals. App. 10a. This Rule requires all applicants for bar admission to be graduates of a law school accredited by the American Bar Association. In its letter to respondent, the Committee indicated that only the Court itself could waive this requirement.

On June 13, 1977, Mr. Feldman submitted a petition directly to the D.C. Court of Appeals. After presenting a detailed description of his background and qualifications, Mr. Feldman asked that he be "waived" into the District of Columbia Bar without examination or, in the alternative, be permitted to take the bar examination. App. 10a. In seeking this relief, respondent made no effort to challenge the validity of Rule 46's requirement of graduation from an approved law school. His

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[2] Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (hereafter "App.") at 8a-9a.

petition named no defendant, was not signed by a member of the Bar, and was not assigned a docket number.

After nine months passed without any action on Mr. Feldman's petition, Mr. Feldman obtained counsel, who wrote a letter, dated March 10, 1978, to the Honorable Theodore Newman, Jr., Chief Judge of the D.C. Court of Appeals. The letter, which was addressed to Judge Newman's chambers, emphasized the importance of acting expeditiously on respondent's petition and reiterated the grounds for granting it. App. 10a-11a. Referring to the Court's "discretion to waive the requirements of Rule 46 in a deserving case," respondent's counsel stressed that "Mr. Feldman's unusually high qualifications provide an ideal occasion for the exercise of such discretion."[3] The letter nowhere asked for any action except a waiver of Rule 46 I; unlike respondent's complaint in the district court, the letter sought neither a declaration that the Rule was invalid nor an injunction against its application. App. 43a-45a.

In his letter, respondent's counsel pointed out that under both the Constitution and federal antitrust laws, serious questions would be raised if the Court refused to exercise its discretion to waive Rule 46 I. However, the plain purpose of this limited legal discussion was to put the D.C. Court of Appeals on notice that, if the Court refused to waive its Rule 46 I on his behalf, Mr. Feldman was prepared to challenge the Rule in the district court. As the letter stated, "[b]arring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school *would raise important questions* under the United States Constitution and the federal antitrust laws — questions that Mr. Feldman is prepared to pursue in the United States District Court if necessary." App. 10a (emphasis added). As the court below noted, by advising the Court that Mr.

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[3] The letter is reprinted in its entirety on pages 23-29 of the Joint Appendix ("JA") filed in the Court of Appeals.

Feldman planned to seek redress in federal court if his petition was denied, counsel's actions were in keeping with "the respect and deference due to the judiciary . . ." App. 43a-45a.

After consulting with the American Bar Association (App. 39a, n.166), the D.C. Court of Appeals on March 30, 1978, issued a one-sentence order stating that "the petition of Marc Feldman to waive the provisions of Rule 46" had been considered and denied. App. 76a. Accompanying the court's order was a letter, dated March 29, 1978, from Chief Judge Newman to respondent's counsel. That letter acknowledged "that Mr. Feldman's record indicates that he has had an exceptional opportunity for training and is a personable, impressive and outstanding individual." However, the letter then stated that "the court has concluded that its rules should not be waived." App. 11a. Neither the D.C. Court of Appeals' order nor Judge Newman's letter contains any hint that the Court believed it was ruling on the merits of a challenge to the validity of Rule 46. The Court neither entered a judgment in accordance with its Rule 36, which governs the disposition of civil appeals, nor filed Judge Newman's letter with its Clerk under Rule 36 as an opinion of the Court.

B. This Suit And The Decisions Below

On May 26, 1978, respondent filed a complaint in the United States District Court for the District of Columbia, seeking a judicial determination that Rule 46 I was invalid both on its face and as applied to him. JA 3-13. The complaint invoked both the Fifth Amendment to the United States Constitution and the federal antitrust laws. Respondent alleged that Rule 46 I impermissibly delegates the court's authority to regulate the practice of law to the ABA, a private entity. JA 10-11. He also alleged that by creating an irrebuttable presumption that only graduates of law schools approved by the ABA are fit to practice law in the District of Columbia, the Rule denied equal protection of the

laws to persons who have pursued alternative methods of legal training, *id.*, and unduly restricted access to the legal profession in violation of the Sherman Act. JA 12.

On October 24, 1978, District Judge June Green entered an order dismissing the complaint on the ground that the district court lacked subject-matter jurisdiction. App. 61a-66a. On July 23, 1981, the United States Court of Appeals for the D.C. Circuit reversed the district court's decision. The court of appeals held that the D.C. Court of Appeals' order denying respondent's petition was not a judicial decision ruling on a present claim of right but an exercise of that Court's administrative power to regulate bar admissions. Based on this rationale, the court determined that the D.C. Court of Appeals' order had no res judicata effect and the district court would not be exercising appellate jurisdiction in adjudicating issues of federal constitutional law neither litigated nor decided in the D.C. Court of Appeals.[4]

REASONS FOR DENYING THE WRIT

Because the petitioners have portrayed the D.C. Circuit's decision as having sweeping consequences, that court's careful summary of the narrow basis of its ruling bears quotation. The court wrote:

> "Lest our decision be interpreted too broadly, we pause to summarize precisely what we have said. In these cases, appellants petitioned the District of Columbia Court of Appeals only to waive on their behalf one of its requirements for admission to the bar. They did not seek review by the Court of Appeals of the decision of any other body

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[4] The D.C. Circuit did, however, affirm the dismissal of Mr. Feldman's antitrust claim, holding that the D.C. Court of Appeals was exempt from the antitrust laws in prescribing educational criteria for bar admission. Mr. Feldman is separately filing a cross-petition seeking review of this portion of the lower court's decision

> or individual; they did not request the court to invalidate any rule, nor did they ask for anything as a matter of right. Consequently, the orders of the Court of Appeals denying the petitions were administrative, not judicial, in nature. In this milieu, given that appellants' constitutional claims are not insubstantial, the District Court had jurisdiction over the subject matter of both actions, and the doctrine of *res judicata* interposes no bar to the prosecution of either."

App. 52a-53a.

In view of this narrow holding, issuance of a writ of certiorari is inappropriate for two reasons: first, a writ of certiorari at this time would bring issues to this Court that need not and should not be decided now, and second, the D.C. Circuit's decision is amply supported by the prior decisions of this Court and is consistent with the decisions of the lower federal courts.

I. This Court Should Deny The Petition Since Further Proceedings May Obviate The Need For Consideration Of These Issues.

Respondent's appeal to the D.C. Circuit of the district court's dismissal of his complaint was necessary because that decision disposed of his entire case. However, review by this Court of the D.C. Circuit's reversal of the district court's decision on jurisdiction is far from necessary. Petitioners could raise this issue again if and when respondent prevailed on the merits. However, a decision against respondent on the merits might prevent the jurisdictional issue from ever reaching the Court. Reasonable prudence and the equities of the case as it stands thus counsel against a premature exercise of this Court's power of certiorari.

II. The Petition Does Not Present Issues Worthy Of This Court's Review.

Petitioners argue that the decision of the court below contradicts cases decided by this Court and by other circuits and preempts the D.C. Court of Appeals' authority to regulate bar admissions. These claims rest on a mischaracterization of the decision of the court below and a misreading of prior decisions of this Court and other lower courts.

A. The Holding That The D.C. Court Of Appeals' Actions Were Administrative In Character And Therefore Subject To Challenge In Federal District Court Applies Long-Standing Decisions Of This Court.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), this Court held that not every action by a court is judicial in character and that, when courts act in a legislative or administrative capacity, they do not adjudicate a case or controversy capable of appellate review. As quoted by the D.C. Circuit, the *Prentis* decision establishes a clear line between the two kinds of actions a court can take:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

211 U.S. at 266, *quoted* at App. 32a-33a. This Court has applied the principles of *Prentis* in numerous cases to hold that actions by courts were legislative or administrative rather than judicial. *See, e.g., Roudebush* v. *Hartke*, 405 U.S. 15 (1972); *Lathrop* v. *Donohue*, 367 U.S. 820 (1961).

As the court below noted, *Prentis* holds that the status of a proceeding before a court "is determined by the nature of the act to which the inquiry and decision lead up." 211 U.S. at 227,

quoted at App. 33a. Here, Mr. Feldman never presented a judicial controversy to the D.C. Court of Appeals. Rather, acknowledging that the Court's Rule 46 barred his admission to the Bar, he requested an exercise of the D.C. Court of Appeals' administrative discretion to waive the Rule on his behalf.

Petitioners omit any reference to *Prentis* and instead rely on *In re Summers*, 325 U.S. 561 (1945). However, as the lower court found, the reasoning employed in *Summers* in fact supports the district court's jurisdiction to entertain Mr. Feldman's case. *Summers* concerned a prospective attorney who possessed all the qualifications to practice law in Illinois but had been denied admission to the bar because he was a conscientious objector. After a character committee of the Illinois bar had rejected his application, Summers commenced a proceeding against the committee in the Supreme Court of Illinois. That court upheld the committee's decision, rejecting Summers' argument that his conscientious objector status was an inadequate basis for refusing him admission to the bar. Summers thereupon sought review in this Court, which rejected a challenge to its own jurisdiction and held that the Supreme Court of Illinois had taken "judicial" action subject to appellate review. *Id.* at 569.

In reaching this conclusion, the Court stressed that, before proceedings could be considered judicial, "[a] declaration on rights as they stand must be sought . . ." *Id.* at 567. This standard was met, the Court determined, because Summers had asserted "[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy." *Id.* at 568. To support this analysis, the Court observed that proceedings before the Supreme Court of Illinois were adversary in character and had been treated as such by all participants. *Id.* at 567. It also emphasized that those proceedings had taken " 'such a form that the judicial power is capable of acting on it.' " *Id.*, quoting *Osborn* v. *Bank*, 22 U.S. 738, 819 (1824).

Unlike Summers, Mr. Feldman did not assert a "claim of a present right to admission" to the District of Columbia bar. Rather, he sought to invoke the discretion of the D.C. Court of Appeals as the administrative body charged by statute with regulating the practice of law. The conclusions of the court below on this point could not be more explicit:

> "Feldman confined his effort in the Court of Appeals to a request for a waiver — not adjudication of the validity — of the rule requiring legal education in ABA-approved schools, and the court's order did not go beyond the limited scope of that request. The order, we have said, was distinctly nonjudicial in character . . .. The Court of Appeals was not requested to review the decision of any other body — indeed, no other entity had the power to grant an exemption — or to originate a decision of its own. To be sure, Feldman argued vigorously that he should be relieved of the requirement of Rule 46 I(b), and predicated part of his reasoning on a perception that the rule was unjust in its application to him and possibly was unlawful. But . . . that sort of communication did not alter the fundamental nature of his endeavor. The vital point is that Feldman did not seek, nor did the court make, any determination respecting the validity of the rule; he merely asked the Court of Appeals to relieve him from it, and expressly reserved his legal claims for possible adjudication on another day in another forum."

App. 46a-47a (footnotes omitted). In short, since Mr. Feldman did not assert "a present right to admission" to the D.C. bar, his petition did not give rise to "case or controversy" that this Court could or should have reviewed.

As petitioners note, on prior occasions, this Court has granted certiorari in cases seeking review of state court decisions concerning bar admissions. In several of these cases, however, disappointed applicants for admission had explicitly challenged bar admission practices on constitutional grounds, and these constitutional claims had been considered and de-

cided on their merits.[5] Thus, the cases cited by petitioners involved the adjudication of "a present claim of right to admission" to the bar — precisely what the court below found lacking here.

B. Every Circuit Court To Consider The Question Decided In This Case Has Reached The Same Result As Did The D.C. Circuit.

The decisions of the lower federal courts adhere fully to the rule embodied in this Court's decisions: Where a state court has taken administrative or ministerial action involving bar admission, its decisions are not reviewable in this Court but must be challenged by independent suits in the district courts.

In deciding cases with facts similar to those presented here, both the Fifth and Seventh Circuits have reached the same result as the D.C. Circuit. In *Ktsanes* v. *Underwood*, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978), appellant had petitioned the Illinois Supreme Court for an exemption from its rule denying reciprocity to persons who had not passed the Illinois bar examination but were admitted to the bars of other states. The Seventh Circuit disagreed that denial of this petition was a "judicial" act reviewable only in this Court:

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[5] *See* In re Anastalpo, 18 Ill. 2d, 182, 163 N.E.2d 429 (1960); Konigsberg v. State Bar of Cal., 52 Cal. Rep. 2d 749, 344 P.2d 777 (1959); Schware v. Board of Bar Examiners, 60 N.M. 304, 291 P.2d 607 (1955), *rev'd* 353 U.S. 232 (1957).

Indeed, this Court has specifically recognized the consideration of constitutional issues by the lower courts in some of these cases. In Willner v. Committee on Character, 373 U.S. 96 (1963), the Court noted that the New York Court of Appeals had amended its remittitur to indicate that Willner had presented his constitutional issues and that the court had passed on and denied those claims. Likewise, in upholding its jurisdiction in Konigsberg v. State Bar, 353 U.S. 252, 255 (1957), this Court emphasized that Konigsberg's petition for review to the California Supreme Court alleged that the decision of the committee that refused to certify him deprived him of due process and equal protection.

> "He was asking for ministerial action, not a judicial determination. The denial of his petition was made by the court acting in an administrative capacity. That denial did not present a case or controversy cognizable by an Article III court, and, thus, was not appealable to the Supreme Court of the United States."

552 F.2d at 743 (citations omitted). In *Dasher* v. *Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), the court upheld the jurisdiction of the federal district court upon finding that, in her petition before the state supreme court, Dasher had not raised the constitutional claims she alleged in her suit. Under such conditions, the court held, this Court could not entertain the case, and the district court was thus not exercising appellate jurisdiction in hearing the suit.

Indeed, there are scores of other reported cases where challenges to bar admission requirements have been decided on their merits by lower federal courts, often after state courts had denied the plaintiff's application for bar admission. [6] Many of these decisions specifically uphold the jurisdiction of the district courts to scrutinize the validity of state bar requirements under the Constitution and other federal laws.

The cases on which petitioners rely are not in conflict with the decision of the D.C. Circuit in this case. Several of these cases involved federal court challenges to state disciplinary or disbarment proceedings against lawyers who had engaged in

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[6] *See, e.g.*, Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Taylor v. Kentucky State Bar Ass'n, F.2d 478 (6th Cir. 1970); Goldsmith v. Pringle, 399 F. Supp. 620 (D. Colo. 1975); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.), *aff'd mem.*, 419 U.S. 955 (1974); Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974); Brown v. Supreme Court of Va., 359 F. Supp. 549 (E.D. Va. 1973), *aff'd mem.* 414 U.S. 1034 (1974); Harris v. Louisiana State Supreme Court, 334 F. Supp. 1289 (E.D. La. 1971); Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971) *(per curiam)*.

misconduct.[7] These proceedings typically possess all of the characteristics of an adversarial contest. A factual record will be developed on the basis of witness testimony and cross-examination; there will be a formal procedure for making and deciding legal arguments; and the ultimate decisionmaker will be a neutral body reviewing the actions of another tribunal. For these reasons, it is hardly suprising that the disbarment orders of state courts have been viewed as "judicial" acts reviewable only in this Court. As the court below observed, "[c]ases precipitated by disciplinary proceedings against lawyers . . . are inapposite because the proceedings challenged therein culminated in *adjudications on the right to engage in law practice*." App. 49a, n.200 (emphasis added). Here, by contrast, no comparable right to engage in law practice was asserted or adjudicated.

Likewise distinguishable are the few reported decisions holding that the district courts lack jurisdiction to entertain challenges to the bar admission actions of state courts. In each of these cases, the disappointed applicant sought federal court review of a particularized admission decision based on the state court's assessment of his specific qualifications; no constitutional challenge to the state's general rules and standards for bar admission was presented.[8] Indeed, the courts in these cases have expressly recognized that, where a plaintiff has attacked the substance or overall implementation of the state's general

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[7] *See* Martinez Rivera v. Trias Monge, 587 F.2d 539 (1st Cir. 1978); Grossgold v. Supreme Court of Ill., 557 F.2d 122 (7th Cir. 1977); MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); Jones v. Hulse, 391 F.2d 198 (8th Cir.) *cert. denied*, 393 U.S. 889 (1968); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962).

[8] Whitwell v. Board of Law Examiners, C.A. 79-1437 (6th Cir. 1981); Woodard v. Virginia Bd. of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980).

criteria for bar admission, the district courts are not barred from exercising jurisdiction. [9]

Mr. Feldman's case fits precisely within this framework. Mr. Feldman's complaint does not challenge a fact-based determination that he is unfit to practice law. [10] Instead, it challenges the adoption and administration of a broad rule denying admission to all persons who have not graduated from an ABA approved law school, regardless of their individual qualifications. Under the decisions of the lower courts, the district court plainly had jurisdiction to entertain these claims.

In sum, the decisions of other lower courts are consistent with the decision of the D.C. Circuit in the instant case. Neither these cases nor the decisions of this Court allow the conclusion that petitioners urge, namely that review of all state court decisions on bar admissions lies in this Court and only in this Court. Rather, a clear and workable distinction has consistently been drawn between actions by state courts in an administrative capacity, which may be challenged in the district courts, and decisions by state courts in judicial proceedings, which are reviewable in this Court. There is no reason why this Court should reexamine this long-standing and sound rule here.

C. The District Of Columbia Court Reorganization Act Of 1970 Does Not Confer Jurisdiction On This Court To Review Rules Originally Promulgated By The D.C. Court Of Appeals.

As an additional basis for challenging the district court's jurisdiction, petitioners invoke the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et. seq.* (1970) (the Court

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[9] *See* Doe v. Pringle, 550 F.2d at 597; Brown v. Board of Bar Examiners, 623 F.2d at 609.

[10] As the letter of its Chief Judge indicates, the Court of Appeals found that he "has had an exceptional opportunity for training and is a personable, impressive and outstanding individual," App. 11a, but it still refused to waive Rule 46 on his behalf.

Reorganization Act). It is clear, however, that the Act does not, and was not intended to, insulate the legislative and administrative actions of the District of Columbia Court of Appeals from scrutiny in the district courts under federal law.

D.C. Code Ann. § 11-102 (1981) provides that "final judgments and decrees" of the District of Columbia Court of Appeals are reviewable by the United States Supreme Court in accordance with 28 U.S.C. § 1257 (1976). This provision merely confirms that judicial decisions of the District of Columbia Court of Appeals — like those of the highest courts of the states — can be appealed directly to the Supreme Court. Nowhere does the provision expand the Supreme Court's jurisdiction by empowering it to review legislative and administrative actions of the District of Columbia Court of Appeals. And nowhere does the provision narrow the jurisdiction of the lower federal courts in the District by stripping them of their traditional power to examine the actions of local officials which are challenged as violative of federal law. [11]

D.C. Code § 11-2501 (1981) directs the District of Columbia Court of Appeals to issue "such rules as it deems proper respecting the examination, qualification and admission of persons to membership in its bar. . . ." The obvious purpose of this directive was to transfer primary responsibility for the licensing of attorneys in the District of Columbia from the United States District Court, which had previously performed that task, to the D.C. Court of Appeals. Congress' desire to give the Court of Appeals principal control over the licensing of attorneys, however, hardly means that it expected admissions require-

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[11] It is widely recognized that, under the Court Reorganization Act, "the Court of Appeals' decisions are reviewable by the Supreme Court on the same basis as those emanating from the states." Thompson v. U.S., 548 F.2d 1031, 1034 (D.C. Cir. 1976). *See also* Key v. Doyle, 434 U.S. 59, 64 (1977); Palmore v. U.S., 411 U.S. 389, 390-93 (1973).

ments adopted by that Court to be totally insulated from scrutiny in the federal courts. Such an intent would represent a sharp departure from the many cases from other jurisdictions in which state admissions requirements have been reviewed by federal courts to assure conformity to federal law.

Nor can it be concluded that Congress intended that every "rule" which the D.C. Court of Appeals promulgates under § 11-2501 would be a "final judgment" or "decree" under § 11-102 reviewable in this Court. The District of Columbia Court Reform and Criminal Procedure Act was intended to establish "a Federal-State court system in the District of Columbia analogous to court systems in the several states." H.R. Rep. No. 91-907, 35 (1970). As indicated above, the courts have held that decisions of the state courts in promulgating rules governing bar admissions are administrative in nature and thus subject to challenge in federal district court, while adjudications of present claims of right to admission are final judgments reviewable in this Court. Nothing in §§ 11-102 or 11-2501 embodies an intent by Congress to depart from this longstanding approach.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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Opposition

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No. 81-1335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
Petitioners,

v.

MARC FELDMAN and EDWARD J. HICKEY, JR.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT EDWARD J. HICKEY, JR. IN OPPOSITION

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QUESTION PRESENTED

Where the District of Columbia Court of Appeals has promulgated a rule governing bar admissions, may respondent bring suit in federal district court challenging that rule's constitutionality after he has requested the District of Columbia Court of Appeals to waive the operation of rule in an exercise of its administrative discretion?

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BRIEF FOR RESPONDENT EDWARD J. HICKEY, JR. IN OPPOSITION

STATEMENT OF THE CASE

For his Statement of the Case, Respondent Hickey adopts the description of the United States Court of Appeals for the District of Columbia Circuit at pages 5-8 of its opinion, set forth in the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 5a-8a.

REASONS FOR DENYING THE WRIT

Respondent Marc Feldman is filing a brief in opposition to the Petition for a Writ of Certiorari which will set forth those arguments that Respondent Hickey would make herein. For the convenience of the Court and in order to avoid duplication, Respondent Hickey hereby adopts the Reasons for Denying the Writ submitted by Respondent Feldman.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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—v.—

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners—who include the Judges of the District of Columbia Court of Appeals and the Court itself—file this brief reply to the briefs in opposition of respondents Feldman and Hickey.[1]

ARGUMENT

Respondents predictably—but inaccurately—attempt to portray the decision below as involving only a narrow question of applying a well-settled legal principle to particular facts. The jurisdictional issue presented here is not so limited. It has sharply divided the five federal judges who have already

1 The brief filed on behalf of Mr. Hickey merely adopts the arguments set forth in the brief filed on behalf of Mr. Feldman. Our reply, accordingly, is addressed to the arguments in the Feldman brief.

considered it.[2] The decision below has also attracted the attention and concern of the highest judicial officers of the 50 states. A brief *amicus curiae* in support of the D.C. Court of Appeals' petition has been filed by the Conference of Chief Justices, which emphasizes that "in addition to the important principles at stake in this case, the decision below would have far-reaching practical consequences unless it is reversed." The Conference urges reversal "in order to prevent the indiscriminate intrusion into state bar matters by lower federal courts." (Brief of the Conference of Chief Justices as *amicus curiae* at 3, 6.) Plainly, the D.C. Court of Appeals is not alone in its perception of the scope and impact of the decision below.

Nor should this Court accept respondents' argument that review of the jurisdictional issue should be delayed as a matter of "prudence and the equities" pending a decision below on the merits. (Brief in Opposition at 6.) Prudence and the equities, we respectfully suggest, dictate not delay but an early and definitive resolution of the jurisdictional question. This is not an ordinary civil proceeding between private parties. At issue here is the jurisdiction of a federal District Court to entertain two extraordinarily intrusive actions in which the Judges of the highest court of the District of Columbia are defendants. As the *amicus* brief notes, "federal district court litigation concerning state court admissions decisions may embroil state supreme court judges in extensive discovery proceedings as litigants seek to probe the judges' decision-making processes." (Brief of the Conference of Chief Justices as *amicus curiae* at 4.)

That is precisely what is being attempted here. Respondents have already sought extensive discovery against the Judges of

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2 Two District Court Judges and a Court of Appeals Judge ruled against jurisdiction in these cases while one Court of Appeals Judge and a Judge of the Court of Claims ruled in favor of jurisdiction. The latter two Judges constituted the panel majority in the Court of Appeals. A petition for rehearing on the jurisdictional issue in the Court of Appeals was denied by a vote of 5 to 3.

the D.C. Court of Appeals and into the Court's judicial processes.[3] The record gives every indication that respondents will try again if the decision below stands. The Judges of the D.C. Court of Appeals should not be subjected to such an intrusion—or to any other aspect of litigation in the federal courts, for that matter—if there is no jurisdictional basis for a lawsuit. In such circumstances, there is ample precedent for prompt review of the threshold jurisdictional issue—to obviate further, and unjustifiable, proceedings. *See, e.g., Laird* v. *Tatum,* 408 U.S. 1 (1971); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947); *United States* v. *General Motors Corp.,* 323 U.S. 373 (1945).

Finally, this Court should not be misled by respondents' remarkable claim that a "clear and workable" distinction has been drawn between those state court bar decisions which may not be reviewed in a federal District Court and those which, according to the respondents, may be. (Brief in Opposition at 13.) If there is such a "clear and workable" distinction, it does not emerge from the 25 pages and 79 footnotes on this issue in the opinion of the Court below. The distinction, according to respondents, turns upon a series of elusive and arcane considerations, including:

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3 In his cross-petition for certiorari, Mr. Feldman's counsel acknowledges that: "Mr. Feldman sought discovery in the district court to determine the degree to which the D.C. Court of Appeals was familiar with and had specifically approved the accreditation process established by the ABA. JA 40. Defendants resisted Mr. Feldman's discovery request, however, and the issue became moot when the district court dismissed the complaint." Cross-Petition at 14 n.11.

Mr. Hickey also sought far-ranging discovery against the D.C. Court of Appeals. He asked, *inter alia,* for "a detailed description of the considerations on which [the denial of his petition to the D.C. Court of Appeals] was based" and for "the identity of all those who participated in each discussion [of his case] and the position taken by each participant in each discussion." (Plaintiff's Interrogatory No. 8.)

—whether the state court decision is "fact-based" or rendered as a matter of law (Brief in Opposition at 13);

—whether the state court proceeding is an admission proceeding or a disbarment proceeding (Brief in Opposition at 11-12);

—whether the plaintiff presented to the state court a "claim of present right" or merely a request for the exercise of "discretion" (Brief in Opposition at 9);

—whether the case involves "particularized" allegations or attacks on the "overall implementation of the state's general criteria for bar admission." (Brief in Opposition at 12-13.)

Not surprisingly, respondent Feldman concludes that his case, at least, "fits precisely within this framework." (Brief in Opposition at 13.) But whatever may be said of this theory—or "framework"—for determining jurisdiction, the *Feldman* and *Hickey* cases themselves prove that it is far from "clear and workable." It elevates form and pleading over substance, and leads to confusion and divergence of judicial opinion on the basic issue of jurisdiction, as evidenced by the various opinions in these cases.

What is clear and workable, we respectfully submit, is the rule laid down by this Court in *In re Summers,* 325 U.S. 561 (1945), and heretofore followed by the overwhelming majority of Courts of Appeals, that:

> "orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on *certiorari* to the state court, and not by means of an original action in a lower federal court." *MacKay* v. *Nesbett,* 412 F.2d 846 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969).

The decision below undermines the vitality of the *Summers* doctrine. Unless corrected by this Court, it will inject renewed

uncertainty concerning the proper role of federal courts in matters of local bar regulation.

The decision below also embodies the implicit assumption that state court judges cannot be trusted to decide issues of federal constitutional law. As respondent Feldman now puts it, federal District Court review of state court bar admission decisions is necessary "to assure conformity to federal law." (Brief in Opposition at 15.)

This Court, however, has never accepted the suggestion that state courts, and their judges, are so unreliable. As Justice O'Connor has recently said:

> "There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge,* 22 Wm. & Mary L. Rev. 801, 813 (1981).

Accord, Sumner v. *Matta,* 449 US. 539 (1981); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975).

That statement applies as forcefully to the Judges of the District of Columbia as it does to the Judges of the 50 states. The District of Columbia Court of Appeals has provided a "hospitable forum" for federal constitutional questions throughout its history under the Court Reform Act. The expanded federal jurisdiction which the decision below authorizes is not only intrusive and inappropriate but it is also wholly unnecessary.

CONCLUSION

For the foregoing reasons, as well as for those stated in the petition for certiorari and in the brief of the Conference of Chief Justices as *amicus curiae,* the petition for certiorari should be granted.

Respectfully submitted,

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I hereby certify that three copies of the foregoing Reply Brief in Support of Petition for Certiorari were sent by first-class mail, postage prepaid, to each of the following persons on this 17th day of March, 1982:

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Conference of Chief Justices moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case.*

1. The Conference of Chief Justices is an organization composed of the highest judicial officers of each State of the United States, the District of Columbia, Puerto Rico, and each U.S. territory. Founded more than thirty

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* *Amicus* has attempted to obtain the written consent of all parties to the filing of the attached brief. Although petitioners have consented, both respondents have refused such permission. *Amicus* has accordingly filed this motion pursuant to Supreme Court Rule 36.1.

years ago and currently affiliated with the National Center for State Courts, the Conference is concerned with the administration of justice in the state court systems over which its members preside and with the relationship of those systems to the federal judiciary.

2. The Conference fully supports the maintenance of federal court jurisdiction in all appropriate cases, as evidenced by its recent unanimously passed resolution opposing legislation to restrict the jurisdiction of the federal courts. The Conference has also consistently taken the position, however, that federal lower court review of the decisions of state supreme courts contradicts important principles of federalism and jeopardizes the integrity of the state court structure. By holding that a federal district court may review the decision of the highest court of an independent jurisdiction concerning admissions to the bar of that court, the decision below threatens these fundamental principles, which are matters of vital concern to *amicus* Conference of Chief Justices.

3. *Amicus* is particularly concerned because the decision below grants to lower federal courts the authority to review state court decisions concerning admissions to the bar of their own states, an area which has traditionally been the exclusive province of the highest court of each jurisdiction. Unless reversed by this Court, the decision below would permit federal courts across the country to intervene in state court regulation of the qualifications, standards of professional conduct, and discipline of the members of its bar.

4. *Amicus* submits that its participation will provide an additional perspective that may prove valuable to the Court in this case. In addition, the granting of this motion will not cause any harm or prejudice to any other party or amicus. The Conference of Chief Justices' motion for leave to file an *amicus curiae* brief in support

of the petition for a writ of certiorari in this case should accordingly be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1335

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
Petitioners,

v.

MARC FELDMAN and EDWARD J. HICKEY, JR.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

As set forth in more detail in the motion for leave to file this brief, *amicus* Conference of Chief Justices is an organization composed of the highest judicial officers of each State of the United States, the District of Columbia, Puerto Rico, and each U.S. territory. The Conference of Chief Justices has a vital interest in the issues of *de novo* review of state court decisions by lower federal courts and the authority of each state court over admissions to its own bar, which are the subjects of the holding of the court below. The impact of the decision below is not limited to the District of Columbia. Unless reversed by this

Court, the decision would permit lower federal courts in each of the fifty states to intervene in and review state court decisions concerning the admission, regulation, and discipline of attorneys. *Amicus* is thus vitally interested in prompt review by this Court of the decision of the court below, and therefore supports the petition for a writ of certiorari.

ARGUMENT

The court below reversed two separate decisions of the United States District Court for the District of Columbia concerning the same subject: the jurisdiction of the federal district courts to review decisions of the highest court of another jurisdiction in bar admissions matters. Both cases involved individual complaints that the District of Columbia Court of Appeals had refused to waive its regular bar admissions rules on the applicants' behalf. Neither applicant sought review in this Court of the decision of the District of Columbia Court of Appeals.[1] Yet the court below, in a split decision, held that the district court had jurisdiction to hear the applicants' claims against the judges of the District of Columbia Court of Appeals and the court's admissions committee.

If applied in other jurisdictions, the decision below would eradicate the basic principle recognized by this Court that "[s]ince the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the states and the District of Columbia within their respective jurisdictions." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979). Just as authority over admissions to the federal bar is controlled by the federal courts, including this Court, the courts in each sovereign state have

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[1] Under 11 D.C. Code § 102 and 28 U.S.C. § 1257, the decisions of the District of Columbia Court of Appeals may be reviewed by this Court. As this Court has previously recognized, the District of Columbia Court of Appeals is the highest court in its jurisdiction and has the status of a state supreme court. Key v. Doyle, 434 U.S. 59, 64 (1977).

"autonomous control" over the regulation of the practice of law within their jurisdiction, subject to review of constitutional questions by this Court. *Theard* v. *United States*, 354 U.S. 278, 281 (1957).

The principle that each court retains control over admissions to its own bar is important because a court is not "merely acting as a state [or federal] licensing agency" in making admissions decisions. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122, 125 (7th Cir. 1977). Instead, as this Court has explicitly held, the admission or exclusion of attorneys involves "the exercise of judicial power" by the courts. *Ex Parte Garland*, 71 U.S. 333, 378-79 (1866). *Accord, e.g., In re Summers*, 325 U.S. 561, 568-69 (1945). To entertain an action challenging such a decision is thus to exercise appellate review over a state court judgment.

"Irrespective of how [a litigant] labels his lawsuit," therefore, a federal court action such as those at issue here is "tantamount to an appeal or a petition to review the state court order." *Jones* v. *Hulse*, 391 F.2d 198, 202 (8th Cir.), *cert. denied*, 393 U.S. 889 (1968). By holding that a federal district court has the power to conduct such proceedings, the court below has erroneously instructed the district court to disregard fundamental principles of comity and federalism, as well as jurisdictional limitations on the district courts, which preclude such review of state court judgments. As this court has long held, "no court of the United States other than this Court could entertain a proceeding to reverse or modify" a state court judgment, since "[t]o do so would be an exercise of appellate jurisdiction" beyond the power of the district courts. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

In addition to the important principles at stake in this case, the decision below would have far-reaching practical consequences unless it is reversed. The same analysis which led the court below to empower federal district

courts to review state court bar admissions decisions could also apply to numerous other areas of state court decision-making, such as attorney discipline, promulgation of ethical standards, regulation of the unauthorized practice of law, and judicial discipline. Even the establishment by state supreme courts of procedural rules could conceivably be considered "non-judicial" and subject to review by inferior federal courts. Under the rationale of the decision below, each individual lawyer or disappointed bar applicant dissatisfied with an admissions decision, a disciplinary sanction, or even a state court procedural rule could conceivably seek *de novo* review on any arguable constitutional ground in a federal district court. Inconsistent interpretations of state rules and their constitutionality could proliferate, even within a single state. Federal and state courts in the same jurisdiction would inevitably conflict with each other concerning admissions and disciplinary practices, or even concerning the application of such rules to individual cases.

Indeed, *de novo* review by federal district courts of state bar admissions and similar decisions would cause serious disruption of the state court system. As illustrated by this very case, federal district court litigation concerning state court admissions decisions may embroil state supreme court judges in extensive discovery proceedings as litigants seek to probe the judges' decision-making processes. *See, e.g.*, Petition for Writ of Certiorari at 8 (referring to interrogatory propounded by respondent Hickey asking, *inter alia*, for "a detailed description of the considerations on which" the denial of his petition was based and "the identity of all those who participated" in deliberations related thereto). In future cases, litigants may even argue that state supreme court judges should be liable in damages for failure to admit them to the bar, arguing that such decisions are, as suggested by the court below, "purely nonjudicial rulings" to which the well-established doctrine of judicial immunity is inapplicable. *See* Appendix to Petition for Writ of Cer-

tiorari at 49a n.199.[2] Such controversies would divert the time and attention of state supreme court judges and would interfere with the performance of their judicial functions, contrary to the decisions of this Court and to principles of comity and federalism. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967) (immunity of state court judges); *United States* v. *Morgan*, 313 U.S. 409 (1941) (limitations on discovery concerning adjudicative decision making).

It is precisely for these reasons that most of the federal appellate courts which have considered this question have held, in accordance with both district court judges in this case, that the federal district courts lack jurisdiction to review state court decisions concerning bar admissions and disciplinary matters. *E.g., Doe* v. *Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); *MacKay* v. *Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); *Jones* v. *Hulse*, *supra*.[3]

This does not mean, of course, that bar-related decisions of state courts cannot be reviewed where constitutional issues are at stake. Under 28 U.S.C. § 1257, this Court has often reviewed such decisions on a writ of certiorari, based upon the record in the state court, thereby providing for federal court review of important constitutional questions while helping to ensure uniformity of interpretation and to prevent unwarranted

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[2] Indeed, the court below itself suggested that the "doctrine of judicial immunity" would not apply to bar admissions decisions since, according to the court below, such decisions do not involve "judicial action." *Id.*

[3] Two federal courts of appeals appear to have reached a contrary result. *See* Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981); Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). *But see Grossgold, supra* (different Seventh Circuit panel reaching opposite result from *Ktsanes*). This conflict among the circuits makes it all the more important that this Court resolve the issue. *See* Supreme Court Rule 17.1(a).

interference with state court systems. *E.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). The decision in this case should be reversed, however, in order to prevent the indiscriminate intrusion into state bar matters by lower federal courts.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari and reverse the decision of the court below.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief of the Conference of Chief Justices as Amicus Curiae in support of Petition for Writ of Certiorari were sent by first-class mail, postage prepaid, this 12th day of February, 1982, to each of the following counsel for the parties in the proceedings in the Court of Appeals:

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Petitioner's Brief

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No. 81-1335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

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—v.—

MARC FELDMAN and EDWARD J. HICKEY, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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September 10, 1982

QUESTION PRESENTED FOR REVIEW

Whether the federal courts in the District of Columbia have jurisdiction to review orders of the District of Columbia Court of Appeals with respect to admission to the D.C. Bar, in view of an Act of Congress expressly transferring jurisdiction over admission to the D.C. Bar from the federal courts to the District of Columbia Court of Appeals and in light of fundamental considerations of comity and federalism.

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This proceeding is for review of a decision of the U.S. Court of Appeals for the D.C. Circuit which disposed of two appeals in that Court. The two appeals, and the parties to the appeals, were:

1. *Feldman* v. *Gardner* [D.C. Cir. No. 78-2235]

Plaintiff

Marc Feldman

Defendants

William C. Gardner
Chairman, Committee on Admissions
District of Columbia Court of Appeals

Anthony Nigro
Secretary, Committee on Admissions
District of Columbia Court of Appeals

Committee on Admissions
District of Columbia Court of Appeals

District of Columbia Court of Appeals

The Honorable Theodore R. Newman, Jr., Chief Judge, District of Columbia Court of Appeals

2. *Hickey* v. *District of Columbia Court of Appeals* [D.C. Cir. No. 79-1233]

Plaintiff

Edward J. Hickey, Jr.

Defendants

District of Columbia Court of Appeals

The Honorable Judges of the District of Columbia Court of Appeals:

Theodore R. Newman, Jr., Chief Judge
Catherine B. Kelly
John W. Kern, III
George R. Gallagher
Frank Q. Nebeker
Walter Yeagley
Stanley S. Harris
Julia C. Mack
John M. Ferren

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OPINIONS BELOW

The split decision of the U.S. Court of Appeals here under review is reported at 661 F.2d 1295 (D.C. Cir. 1981). That opinion decided two separate appeals from decisions of Judges of the U.S. District Court for the District of Columbia dismissing complaints for lack of subject-matter jurisdiction: (i) an appeal from the unreported decision of Judge June L. Green in *Feldman* v. *Gardner* (D.D.C.) (Memorandum Opinion filed October 24, 1978); and (ii) an appeal from the unreported decision of Judge Harold H. Greene in *Hickey* v. *District of Columbia Court of Appeals* (D.D.C.) (Memorandum Order

filed December 21, 1978).[1] The two appeals were not formally consolidated in the U.S. Court of Appeals, but the Court heard argument in both cases on the same day and decided the cases together.

The two decisions of the District of Columbia Court of Appeals involved in this matter are not reported. Along with all the above unreported decisions, they are included in the Joint Appendix.

STATEMENT OF JURISDICTION

The panel of the U.S. Court of Appeals filed its opinion on July 23, 1981, and petitions for rehearing and suggestions for rehearing *en banc* were denied on October 27, 1981. A petition for certiorari on the jurisdictional issue was filed within 90 days of the Court of Appeals' denial of rehearing. This Court granted the petition on June 28, 1982. The Court has jurisdiction to review the Court of Appeals decision under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES AND RULES INVOLVED

The principal statutes involved in this case are 11 D.C. Code §§ 102 and 2501(a). These are provisions of the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (1970) (hereinafter referred to as the "Court Reorganization Act"). This statute comprehensively reorganized the court system in the District of Columbia.

11 D.C. Code § 102 provides:

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1 Although Judge Greene's final decision is not reported, his decision denying interlocutory relief in the matter is reported. *Hickey* v. *District of Columbia Court of Appeals*, 457 F. Supp. 584 (D.D.C. 1978). The decision of the U.S. Court of Appeals for the District of Columbia Circuit dismissing an appeal from Judge Greene's decision on interlocutory relief is not reported. Order of July 24, 1978, No. 79-1233.

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code."

11 D.C. Code § 2501(a) provides:

"The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion."

The case also involves Rule 46I(b)(3) of the General Rules of the D.C. Court of Appeals, which provides:

"An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school."

STATEMENT OF THE CASE

A. Background Facts

The District of Columbia Court Reorganization Act provides in relevant part that "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar . . . ." 11 D.C. Code § 2501. *See Matter of Keiler,* 380 A.2d 119, 124 (D.C. 1977).

Pursuant to this statutory authority, the D.C. Court of Appeals has promulgated rules for admission to the District of

Columbia Bar, including the following provision with respect to legal education:

> "An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school." General Rules, D.C. Court of Appeals, Rule 46I(b)(3).

The foregoing educational requirement has been widely adopted; indeed, the same, or a similar, rule is in effect in most other jurisdictions. Thus, at least thirty-two states, in addition to the District of Columbia, limit admission to the bar to graduates of law schools approved by the American Bar Association.

So far as we are aware, no court has ever held this requirement to be unlawful. On the contrary, the constitutionality of the requirement that applicants for the bar have graduated from an ABA-approved law school has been universally upheld by both federal and state courts as rationally related to the state's incontrovertible interest in insuring the fitness and capacity of those persons who practice law.[2] This Court, in

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2 *See, e.g., Santos* v. *Alaska Bar Association,* 618 F.2d 575 (9th Cir. 1980); *Moore* v. *Supreme Court of South Carolina,* 577 F.2d 735 (4th Cir. 1978) (unpublished decision), *cert. denied,* 439 U.S. 984 (1978); *Lombardi* v. *Tauro,* 470 F.2d 798 (1st Cir. 1972), *cert. denied,* 412 U.S. 919 (1973); *Hackin* v. *Lockwood,* 361 F.2d 499 (9th Cir. 1966), *cert. denied,* 385 U.S. 960 (1966); *Ostroff* v. *New Jersey Supreme Court,* 415 F. Supp. 326 (D.N.J. 1976); *Potter* v. *New Jersey Supreme Court,* 403 F. Supp. 1036 (D.N.J. 1975); *Harris* v. *Louisiana State Supreme Court,* 334 F. Supp. 1289 (E.D. La. 1971); *Appeal of Murphy,* 393 A.2d 369 (Pa. 1978), *appeal dismissed and certiorari denied sub nom. Murphy* v. *Pennsylvania State Board of Law Examiners,* 440 U.S. 901

fact, has held that a challenge to the constitutionality of the requirement does not even present a substantial federal question. *Application of Hansen,* 275 N.W.2d 790 (Minn. 1978), *appeal dismissed for want of a substantial federal question,* 441 U.S. 938 (1979).

It has been repeatedly noted in the cases that the courts lack the resources and expertise to engage in a case-by-case evaluation of law schools or in an *ad hoc* assessment of the qualifications of each applicant. The role of the ABA in providing a national system for evaluation of legal education has been consistently upheld. The Minnesota Supreme Court, for example, has held:

> "It is also rational for a state supreme court to conclude that the ABA is best equipped to perform the function of accrediting law schools. . . . We have neither the time nor the expertise to investigate individually the special training of an applicant or the program offered by specific law schools, and any attempt by us to do so would be inefficient and chaotic." *Application of Hansen, supra,* 275 N.W.2d at 794, 796.

Moreover, as Judge Harold H. Greene noted when he denied preliminary relief in the *Hickey* case:

(1979); *In re Stephenson,* 511 P.2d 136 (Alaska 1973); *Application of Schatz,* 80 Wash. 2d 604, 497 P.2d 153 (1972); *Petition of Batten,* 83 Nev. 265, 428 P.2d 195 (1967); *In re Lorring's Petition,* 75 Nev. 330, 340 P.2d 589 (1959); *Henington* v. *State Board of Bar Examiners,* 60 N.M. 393, 291 P.2d 1108 (1956); *State ex rel. Ralston* v. *Turner,* 141 Neb. 556, 4 N.W.2d 302 (1942); *Rosenthal* v. *State Bar Examining Committee,* 116 Conn. 409, 165 A. 211 (1933).

The federal courts that have assumed jurisdiction to adjudicate such matters have usually done so in the context of general challenges to the ABA requirement. Where, as in the two cases now before the Court, a particular applicant seeks consideration of his individualized situation and especially where, as in the present cases, the local court has already adjudicated the applicant's case, federal courts repeatedly have held themselves without subject matter jurisdiction to review the local court's determination. *See* pp. 22-24, *infra.*

> "Quite apart from decisional law, it appears to the Court that a requirement of graduation from an accredited law school constitutes a reasonable measure to maintain high standards in the legal profession, and that, at a minimum, this is a decision for the state accrediting agencies and highest courts of the states to make." *Hickey* v. *District of Columbia Court of Appeals, supra,* 457 F. Supp. at 587.

Notwithstanding this settled and uniform body of precedent upholding the ABA requirement, the two proceedings now under review in this Court challenged the constitutionality of the D.C. Court of Appeals' Rule requiring graduation from an ABA-approved law school as a prerequisite to admission to the D.C. bar examination. Both proceedings present the same jurisdictional issue, although on somewhat different facts. For purposes of clarity, therefore, the facts of each case are separately stated below.

B. Respondent Feldman's Case

Respondent Feldman did not attend law school but read law instead, as permitted in Virginia. He was admitted to the Virginia Bar in April 1976.

In November 1976, he submitted an application to the Committee on Admissions of the D.C. Court of Appeals seeking admission to the D.C. Bar without examination. The Committee notified him that it could not admit him because he had not graduated from a law school approved by the American Bar Association, as required by Rule 46I(b)(3) of the General Rules of the D.C. Court of Appeals. The Committee advised Mr. Feldman that the authority to grant waivers of the Rules rested solely with the Court.

Thereafter, in June 1977, Mr. Feldman filed a petition with the D.C. Court of Appeals seeking the same relief. In his petition, he acknowledged that he did not comply with the Court's Rule, but alleged that his "professional education and

training is equal to that received by those who have attended an ABA-approved law school." (Petition of Marc Feldman for Admission to the Bar of the District of Columbia Without Examination, June 13, 1977, p. 5; J.A. 4a.)

His counsel later submitted a lengthy letter on his behalf to the D.C. Court of Appeals. The letter was in the nature of a brief, and argued that "barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions under the United States Constitution and the federal antitrust laws." Mr. Feldman's counsel cited various decisions purporting to support this challenge to the D.C. Court of Appeals' Rule, and contended that "it is clear that a bar admissions procedure that requries graduation from an ABA-accredited law school cannot stand." (Letter of March 6, 1978, pp. 1, 7; J.A. 6a, 13a.)

On March 30, 1978, after considering Mr. Feldman's petition and the submission by his counsel, the D.C. Court of Appeals, acting *en banc,* issued a *per curiam* order denying the petition. (Order of March 30, 1978; J.A. 18a.) A letter signed by Chief Judge Theodore R. Newman, Jr., was sent on behalf of the Court to Mr. Feldman's counsel and explained the basis for the Court's order. The letter said:

> "Pursuant to the usual practice of this Court, Mr. Feldman's petition was referred to the Committee on Admissions for its review. The Committee recognizes that Mr. Feldman's record indicates he has had an exceptional opportunity for training and is a personable, impressive, and outstanding individual. However, the purpose of the rule, which requires graduation from a law school approved by the American Bar Association or 24 hours of study after graduation from a non-approved law school to be eligible to sit for the bar examination, is to prevent the Committee and the Court from assuming the practicably impossible task of making separate subjective evaluations of each applicant's training and education; hence, an objective and reasonable standard as prescribed by the rule must be utilized.

> "The Committee unanimously has recommended that the petition of Mr. Feldman be denied, and the Court has concluded that its rules should not be waived. Mr. Feldman, of course, will be eligible to make an application for admission to the bar after he has completed five years of practice." (Letter of March 29, 1978 from the Honorable Theodore R. Newman, Jr., to Robert M. Sussman, Esq.; J.A. 16a-17a.)

Although decisions of the D.C. Court of Appeals are reviewable in this Court under 11 D.C. Code § 102, *supra,* Mr. Feldman did not seek review here. Instead, two months later, he commenced an action in the U.S. District Court for the District of Columbia and named as defendants, *inter alia,* Chief Judge Newman, the D.C. Court of Appeals and the Court's Committee on Admissions.

His complaint alleged that the local court "has refused to exercise its plenary power over the licensing of attorneys to waive [its] rules on plaintiff's behalf." (Complaint ¶ 1; J.A. 36a.) The complaint set forth the particular facts of Mr. Feldman's case and had attached to it as exhibits his petition in the D.C. Court of Appeals and his counsel's submission to that Court. The complaint alleged, *inter alia:*

> "By refusing to consider whether plaintiff's individual qualifications and training were equivalent to graduation from an ABA accredited law school and for that reason justified a waiver of Rule 46 I, the defendant Court of Appeals acted arbitrarily and capriciously and, accordingly, deprived plaintiff of his liberty and property without due process of law." (Complaint ¶ 28(d); J.A. 42a.)

The complaint restated the specific constitutional and antitrust theories previously argued by Mr. Feldman's attorney in his letter to the D.C. Court of Appeals, and it stressed that the same issues had been raised before the D.C. Court of Appeals. In the proceeding before the local court, the complaint said, Mr. Feldman's counsel had:

> "argued that, on its face and as applied, Rule 46 violated both the United States Constitution and the federal antitrust laws insofar as it conclusively denied admission to the bar to all persons except graduates of an ABA accredited law school." (Complaint ¶ 24; J.A. 41a.)

The complaint requested a declaratory judgment and an injunction against the D.C. Court of Appeals, requiring the local court to (a) admit Mr. Feldman to its Bar without examination, or (b) permit him to sit for the D.C. bar examination, or (c) make an *ad hoc* determination whether his qualifications were equivalent to those of applicants who had met the Court's prescribed educational standards and, if so, admit him to the D.C. Bar or the bar examination. (Complaint, Prayer for Relief, ¶ 2; J.A. 44a.)

With his complaint, Mr. Feldman filed interrogatories and a request for production of documents directed to the D.C. Court of Appeals and relating to the Court's prior decision to deny his petition He asked the Court, for example, to:

> "Identify all documents which refer to, relate to, concern or reflect plaintiff's application for admission to the District of Columbia Bar, his petition for a waiver of Rule 46, his legal training, or his qualifications to practice law." (Plaintiff's Interrogatories—First Set, No. 5; J.A. 56a.)

The D.C. Court of Appeals, and the other defendants, moved to dismiss the complaint on the ground that the District Court lacked jurisdiction to review the decision of the local court in Mr. Feldman's case and, alternatively, on the ground that his claims—having already been presented to and rejected by the D.C. Court of Appeals—were barred by *res judicata*. The defendants moved to stay Mr. Feldman's discovery pending resolution of their motion to dismiss, and the District Court granted the stay.

In October 1978, the District Court dismissed the complaint for lack of subject-matter jurisdiction, without reaching the question of *res judicata*. The Court said:

> "If this Court were to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court. Congress explicitly denied such a position to this Court when it enacted the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970) and exclusively empowered the D.C. Court of Appeals with authority to prescribe rules for admission to the D.C. bar." (Memorandum Opinion of October 24, 1978; J.A. 82a-83a.)

On Mr. Feldman's appeal of the dismissal, the panel of the U.S. Court of Appeals rendered the decision at issue here, and held that there was original subject-matter jurisdiction in the federal courts over Mr. Feldman's constitutional claims. The Court held that such jurisdiction was lacking over his antitrust claims because of their insubstantiality.

C. Respondent Hickey's Case

Respondent Hickey graduated from the Potomac School of Law in Washington, D.C., in the summer of 1978. Potomac was organized and enrolled its first class in 1975. It has never been approved by the American Bar Association. The school is presently involved in proceedings under Chapter 11 of the bankruptcy laws. *In re Potomac School of Law* (D.D.C. No. 81-00307) (petition filed June 5, 1981).

In April 1978, prior to his graduation, Mr. Hickey submitted a Special Petition to the D.C. Court of Appeals, requesting that the Court waive, in his case, its Rule requiring graduation from an ABA-approved law school as a prerequisite to sitting for the D.C. bar examination. He was represented by counsel and argued—as Mr. Feldman had—that he was qualified to sit for the examination notwithstanding the fact that he did not qualify under the Court's rules. His petition stressed his "unique background" and recited his individual qualifications in detail. (In the Matter of Edward J. Hickey, Jr., Special Petition for a Waiver of District of Columbia Court of Appeals Rule 46I(b)(3), April 18, 1978, pp. 2-3; J.A. 21a.)

On June 12, 1978, the D.C. Court of Appeals, acting *en banc,* entered an order denying the Hickey petition. The Court noted that its Rules would allow Mr. Hickey to take the D.C. bar examination if he completed 24 semester hours in an ABA-approved law school. (J.A. 49a.)

After the denial of his petition by the D.C. Court of Appeals, Mr. Hickey—again like Mr. Feldman—took his case to the U.S. District Court rather than seeking review in this Court. On July 10, 1978, he filed a complaint for a declaratory judgment and for injunctive relief against the D.C. Court of Appeals and the individual Judges of that Court. The complaint alleged that the D.C. Court of Appeals' action in Mr. Hickey's case violated his Fifth Amendment rights in several respects. For example, tracking the language of the Feldman complaint, Mr. Hickey's complaint said:

> "By refusing to consider whether Plaintiff's individual qualifications and training were equivalent to graduation from an ABA accredited law school and for that reason justified a waiver of Rule 46 I.(b)(3), the Defendants acted arbitrarily and capriciously and, accordingly, deprived Plaintiff of his liberty and property without due process of law." (Complaint ¶ 11(d); J.A. 64a-65a.)

The Hickey complaint, like the Feldman one, also alleged a violation of the federal antitrust laws. (Complaint ¶¶ 12-15; J.A. 65a.)

Upon filing his complaint, Mr. Hickey moved immediately for interlocutory relief requiring the local court to admit him to the July 1978 D.C. bar examination. The District Court, however, denied his request for interlocutory relief, *Hickey* v. *District of Columbia Court of Appeals,* 457 F. Supp. 584 (D.D.C. 1978), and the U.S. Court of Appeals dismissed his appeal of the denial. *Hickey* v. *District of Columbia Court of Appeals* (D.C. Cir. No. 79-1233) (July 24, 1978).

The D.C. Court of Appeals and its Judges thereafter moved to dismiss the Hickey complaint for lack of subject-matter

jurisdiction. In the period prior to the District Court's ruling on the motion, Mr. Hickey's counsel attempted an extensive program of discovery from the D.C. Court of Appeals, seeking to probe the local court's decision-making processes in bar admission matters. With respect to the denial of Mr. Hickey's petition, his counsel asked, *inter alia,* for "a detailed description of the considerations on which this denial was based" and for "the identity of all those who participated in each discussion and the position taken by each participant in each discussion." (Plaintiff's Interrogatory No. 8; J.A. 88a.)

In December 1978, the District Court dismissed the Hickey complaint for lack of subject-matter jurisdiction. Like the District Court in the *Feldman* case, the District Court in *Hickey* ruled that it had no jurisdiction to review the D.C. Court of Appeals' decision in the matter. The District Judge in *Hickey,* Judge Harold H. Greene, said:

> "*It is well settled that the admission and exclusion of attorneys by the members of the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court. In re Summers,* 325 U.S. 561 (1945); *Ex parte Garland,* 71 U.S. 333, 378-79 (1866); *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977); *McKay* v. *Nesbett,* 412 F.2d 846 (9th Cir. 1969); *Jones* v. *Hulse,* 391 F.2d 198 (8th Cir. 1968); *Feldman* v. *Gardner,* C.A. No. 78-0957 (D.D.C. Oct. 24, 1978). Plaintiff's argument that this case is properly before this Court as a broad constitutional attack on defendants' 'rulemaking authority or the administration of the rules,' as distinguished from a 'review of a state court's adjudication of a particular application' (*Doe* v. *Pringle, supra,* 550 F.2d at 597), must fail." (Memorandum Order of December 21, 1978; J.A. 143a.) (Emphasis supplied.)

Judge Greene further stated:

> "However the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of

defendants' denial of his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case. In view of that circumstance, there is no basis for the extraordinary attempt to invoke the jurisdiction of this Court on a matter entrusted by the Congress to the D.C. Court of Appeals." (*Id.*; J.A. 143a.)

Mr. Hickey appealed, and his appeal was considered by the U.S. Court of Appeals at the same time as the appeal in the *Feldman* case. The U.S. Court of Appeals panel reached the same results as it had in the *Feldman* case.

D. The Decision Under Review

In the decision here under review, the U.S. Court of Appeals held, by a two-to-one vote and contrary to the prior holdings of both District Judges, that the federal District Court in the District of Columbia has jurisdiction to review the decisions of the D.C. Court of Appeals in these cases respecting bar admission.[3] This is so, the panel majority said, because the D.C. Court of Appeals' decisions to deny admission to the bar examination were of "ministerial" and "nonjudicial" character, and were not subject to review in this Court. 661 F.2d at 1318-19.[4] The panel majority concluded:

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3 The U.S. Court of Appeals also held, unanimously, that the Feldman and Hickey antitrust claims were insubstantial and had been properly dismissed. By orders dated June 28, 1982, this Court denied cross-petitions for certiorari as to the ruling on the antitrust claims. That aspect of the U.S. Court of Appeals' decision, accordingly, is not before this Court.

4 The panel majority consisted of one member of the U.S. Court of Appeals, Chief Judge Robinson, and one member of the U.S. Court of Claims, Judge Davis, sitting by designation. Circuit Judge Robb dissented.

> "In sum, our analysis of these cases in light of the relevant precedent constrains us to hold that in each instance the prior proceedings before the [District of Columbia] Court of Appeals were of a nonjudicial character, and therefore did not produce in either a judgment reviewable by the Supreme Court. It follows that appellants' suits in the District Court were jurisdictionally appropriate for consideration and disposition of their constitutional claims." 661 F.2d at 1319 (footnotes omitted).

The panel dissent took a different view, which was consistent with the rulings of the two District Court judges. Judge Robb said:

> "The decision of the majority sanctions an intrusion by the federal courts into what Congress plainly intended to be the prerogative of the District of Columbia court. I think this is unfortunate. It is especially unfortunate in cases such as these in which candidates for admission to the bar are challenging the judgment of the District of Columbia Court of Appeals that they are not qualified to take the bar examination. In my opinion that kind of controversy should not be the business of the United States District Court." 661 F.2d at 1322.

Rehearing *en banc* on the jurisdictional issue was denied by a 5 to 3 vote, and the present certiorari proceeding followed.

SUMMARY OF ARGUMENT

The principal petitioners in this case are the Judges of the District of Columbia Court of Appeals and the Court itself. The D.C. Court of Appeals is the highest court of the District of Columbia and has the status of a state supreme court. *Key* v. *Doyle,* 434 U.S 59, 64 (1977). Its decisions, like those of a state supreme court, are reviewable in this Court. 11 D.C. Code § 102. But they are not reviewable anywhere else.

The split decision of the U.S. Court of Appeals for the District of Columbia Circuit held that decisions of the D.C. Court of Appeals respecting admission to the D.C. Bar are different from the D.C. Court of Appeals' other decisions. Such decisions are not subject to review in this Court, the U.S. Court of Appeals ruled, but may be reviewed instead by the federal District Court in the District of Columbia. Such lower court review is available, according to the decision below, because bar admission decisions are "nonjudicial" and merely "ministerial" in character, and cannot be reviewed by this Court.

The decision below is erroneous for at least three fundamental reasons:

First, the decision below subverts Congress' very clear intent to remove authority over admission to the D.C. Bar from the jurisdiction of the federal courts in the District and to transfer the authority and responsibility for the governance of the Bar exclusively to the D.C. Court of Appeals. Thus, although the federal courts in the District of Columbia previously had regulated the D.C. Bar, Congress withdrew that jurisdiction in 1970 when it reorganized the court system in the District. The Court Reorganization Act conferred express and exclusive jurisdiction on the D.C. Court of Appeals over "examination, qualification, and admission" to the D.C. Bar. 11 D.C. Code § 2501(a). The decision below has the effect of recapturing for the lower federal courts in the District the supervisory bar jurisdiction that Congress purposefully withdrew from them.

Second, the decision below also authorizes litigants to bypass the established statutory procedure for review of the decisions of the D.C. Court of Appeals. Like the decisions of state supreme courts, decisions of the D.C. Court of Appeals "are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code." 11 D.C. Code § 102. It is well settled that bar admissions decisions of a jurisdiction's high court, as well as bar disciplinary and disbarment decisions, are judicial decisions subject to review in this Court. *E.g., In re Summers,* 325 U.S. 561

(1945); *Ex parte Garland,* 71 U.S. 333 (1866). Yet the decision below declares that this Court could not have reviewed the bar decisions here at issue and authorizes a wholly different kind of review—federal District Court review—instead.

Third, the decision below violates fundamental principles of comity and federalism by sanctioning federal intrusion into a matter of historic, and unusually sensitive, local concern. As this Court has said: "Since the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions," *Leis* v. *Flynt,* 439 U.S. 438, 442 (1979). The intrusion that the U.S. Court of Appeals now has authorized into this area of local prerogative is not only inappropriate and disruptive but it is wholly unnecessary. The Judges of the D.C. Court of Appeals are bound to uphold the Constitution and laws of the United States just as federal judges are. And review in this Court remains available in any event. What is not available in a properly balanced federal system, we respectfully submit, is what the U.S. Court of Appeals panel has authorized here: review of a local high court's decisions by a federal District Court.

Although the issues raised by the decision below may be especially important in the District of Columbia, the effect of the decision—as the foregoing discussion indicates—is not so limited. The D.C. Court of Appeals' position has been supported by the Conference of Chief Justices of the fifty states, as *amicus curiae,* which has expressed a "vital interest" in the matter and has confirmed the extraordinarily intrusive effect of a decision that "would permit lower federal courts in each of the fifty states to intervene in and review state court decisions concerning the admission, regulation, and discipline of attorneys." (Motion for Leave to File Brief Amicus Curiae and Brief of the Conference of Chief Justices as Amicus Curiae in Support of Petition for Writ of Certiorari, at 2.)

ARGUMENT

A. The U.S. Court of Appeals' Decision Upsets Congress' Allocation of Jurisdiction over Admission to the D.C. Bar

The U.S. Court of Appeals' decision in these cases upsets the careful allocation of jurisdiction between federal and local courts that Congress made when it reorganized the court system in the District of Columbia in 1970. When it passed the District of Columbia Court Reorganization Act, 84 Stat. 473 (1970), Congress conferred sole and exclusive jurisdiction on the D.C. Court of Appeals over "examination, qualification, *and admission*" to the D.C. Bar. 11 D.C. Code § 2501(a). (Emphasis supplied.) Congress deliberately removed such matters from the purview of the federal courts in the District, which had previously regulated admission to the D.C. Bar.

The District of Columbia Bar is the bar of the D.C. Court of Appeals. It is no longer the bar of the U.S. District Court for the District of Columbia, which was the unique and anomalous situation that prevailed before the Court Reorganization Act. The U.S. Court of Appeals' decision thus seeks to reclaim for the federal courts the very authority and responsibility that Congress so purposefully withdrew.

The decision below, in effect, challenges the authority and the competence of the District of Columbia Court of Appeals, even though the D.C. Court of Appeals—both generally and specifically in matters of admission to the D.C. Bar—is no longer subordinate to the lower federal courts in the District. Under the Court Reorganization Act, 11 D.C. Code § 102, the D.C. Court of Appeals is the highest court of the District of Columbia, deriving its status from Congress' power to legislate for the District. In matters of bar admission, moreover, it has plenary jurisdiction granted by Congress.

Yet the panel majority's decision effectively holds that the D.C. Court of Appeals cannot be relied on to exercise this jurisdiction responsibly in matters of bar admission and con-

form its procedures to the requirements of law; the local Court must again be subservient to the federal courts in the District. This decision was rendered in the face of a congressional mandate to the contrary of exceptional clarity. Judge Harold H. Greene put the point succinctly in *Hickey*:

> "The D.C. Court of Appeals is the highest court of the District of Columbia, and its status is that of a state supreme court. Any order directed to it or its judges would be a serious intrusion into areas which not only are intrinsically matters of local judicial administration and concern, but *which were deliberately transferred from this Court to defendants' control by the Court Reform and Criminal Procedure Act of 1970,* 84 Stat. 473 (1970)." 457 F. Supp. at 586 (Emphasis supplied.)

Permitting review of the decisions of the D.C. Court of Appeals by a federal court of limited jurisdiction compromises the authority of the highest Court of the District of Columbia and undermines the division of responsibility that a federal system requires and that Congress adopted for the District of Columbia. *See Key* v. *Doyle*, 434 U.S. 59, 64 (1977). The decision below, if permitted to stand, will encourage disappointed bar applicants to invoke the jurisdiction of the District Court, with the result that substantial control over admission to the bar will be exercised by that court and not the court to which Congress entrusted such responsibility.

It is ironic, to say the least, that the experienced District Judges in this case both properly declined to interfere with the congressional allocation of jurisdiction, and that it is the U.S. Court of Appeals panel which would press an unwanted and unwarranted jurisdiction on the District Court in the District of Columbia. Regrettably, this is not the first time that the U.S. Court of Appeals for the D.C. Circuit has sought to recapture a jurisdiction and power over the courts and citizens of the District of Columbia of which Congress has divested it. *Cf. Swain* v. *Pressley*, 430 U.S. 372 (1977). This Court once again must rebuff the effort and reestablish the congressionally mandated balance.

B. The U.S. Court of Appeals' Decision Undermines and Contravenes the Statutory Procedure for Review of Decisions of the D.C. Court of Appeals

The U.S. Court of Appeals' decision also undermines and contravenes the procedure established by Congress for review of decisions of the D.C. Court of Appeals. 11 D.C. Code § 102 provides:

> "The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code."

The decisions of the D.C. Court of Appeals in these cases, denying respondents' petitions to sit for the D.C. bar examination because neither satisfied the Court's Rules governing admission to the Bar, were reviewable in this Court under this statute. Respondents elected not to seek such review, however. Instead they sought review in the federal District Court. The U.S. Court of Appeals' decision mandating such District Court jurisdiction creates a new, and wholly improper, review procedure that would bypass the system established by Congress and allow the very judicial review that Congress prohibited.[5]

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5 Once again, the U.S. Court of Appeals panel has sought to resurrect a form of reviewing jurisdiction over the D.C. Court of Appeals by the lower federal courts of the District of Columbia which existed before the Court Reorganization Act but which was deliberately eliminated by Congress. Prior to 1970, decisions of the D.C. Court of Appeals were reviewable directly in the U.S. Court of Appeals rather than in this Court: "A party aggrieved by a judgment of the District of Columbia Court of Appeals may seek a review thereof by the United States Court of Appeals for the District of Columbia Circuit by petition for the allowance of an appeal." 77 Stat. 479 (former section 11-321(b) of the D.C. Code). But Congress swept that away in 1970 when it made the D.C. Court of Appeals the "highest court of the District of Columbia" and provided for direct review of its decisions here.

The panel majority in the U.S. Court of Appeals reasoned that the decisons of the D.C. Court of Appeals in these cases were not judicial, but only "ministerial" acts and were not, therefore, reviewable in this Court, but were reviewable in the District Court instead. According to the panel majority, "the prior proceedings before the [D.C.] Court of Appeals were of a nonjudicial character, and therefore did not produce in either a judgment reviewable by the Supreme Court." 661 F.2d at 1319 (footnote omitted).

The controlling law in this Court is squarely to the contrary. This Court stated as early as 1866 that attorneys are officers of the court and that "[t]heir admission or their exclusion *is not the exercise of a mere ministerial power. It is the exercise of judicial power,* and has been so held in numerous cases." *Ex parte Garland,* 71 U.S. 333, 378-79 (1866). (Emphasis supplied.) And the Court has expressly held:

> "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution where federal questions are raised and proper steps taken to that end, *in this Court.*" *In re Summers,* 325 U.S. 561, 568-69 (1945). (Emphasis supplied.)

When substantial federal claims or rights are at issue, this Court often has reviewed local decisions in bar matters. Indeed, its repeated review of bar-related decisions of state courts on certiorari confirms their judicial nature; if they were not judicial in character, they would not have been reviewable here. *See, e.g., Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957) (certiorari to the Supreme Court of New Mexico); *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (1957) (certiorari to the Supreme Court of California); *Konigsberg* v. *State Bar of California,* 366 U.S. 36 (1961) (certiorari to the Supreme Court of California); *In re Anastaplo,* 366 U.S. 82 (1961) (certiorari to the Supreme Court of Illinois); *Willner*

v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) (certiorari to the Court of Appeals of New York); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971) (certiorari to the Supreme Court of Arizona); *In re Stolar*, 401 U.S. 23 (1971) (certiorari to the Supreme Court of Ohio).

The present cases are controlled by these principles and, specifically, by the rule of *Garland* and *Summers*, *supra*. The only difference here is that respondents have claimed that they are entitled to take the D.C. bar examination rather than that they must be directly admitted to the bar.[6] As the panel dissent in the U.S. Court of Appeals correctly noted:

> "I can see no difference in principle, so far as review in the Supreme Court is concerned, between denial of a claim of present right to admission to the bar, on the one hand, and denial of a claim that the appellants are presently qualified to take the bar examination." 661 F.2d at 1321-22.[7]

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6 Mr. Feldman sought either direct admission to the D.C. Bar or entry to the bar examination. (Complaint, Prayer for Relief, ¶ 2; J.A. 44a.)

7 Respondents laboriously sought in the courts below to show that the proceedings they initiated in the D.C. Court of Appeals were not "judicial" in form and therefore did not result in judicial determinations by the D.C. Court of Appeals which were reviewable in this Court. Suffice it to say that even the panel majority did not rely on any such ground, and it professed to heed the admonition of this Court in *Summers* that the true nature and effect of the proceeding in the local court control, not its form. *See* 661 F.2d at 1314 n.166; 325 U.S. at 567.

Where the Court below erred was in its failure to recognize that the substance of the action of the D.C. Court of Appeals was judicial in nature. Both respondents sought decisions by the D.C. Court of Appeals admitting them to the D.C. bar examination, based on the particular circumstances of their cases. The grant or denial of such petitions could not have been a purely "ministerial" action, but called for the exercise of judicial judgment and for a judicial determination solely within the province of the Court, acting as a Court. The record fully supports the findings of both District Judges (J.A. 82a, 143a) that the *en banc* decisions of the D.C. Court of Appeals denying

The overwhelming weight of authority in the circuits is consistent with this Court's precedents on the issue and with the dissenting view in the court below. The U.S. Court of Appeals for the Ninth Circuit, for example, has held that:

> "*orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court.*" *MacKay* v. *Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969) (Emphasis supplied.) *Accord*, *Brown* v. *Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980).

Decisions in most of the other Circuits apply the same rule. *See Diaz-Buxo* v. *Trias Monge*, 593 F.2d 153 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979); *Martinez Rivera* v. *Trias Monge*, 587 F.2d 539 (1st Cir. 1978); *Woodard* v. *Virginia Board of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979); *Kimball* v. *Florida Bar*, 632 F.2d 1283 (5th Cir. 1980); *Whitwell* v. *Board of Law Examiners*, 652 F.2d 60 (6th Cir.), *cert. denied*, 50 U.S.L.W. 3246 (1981); *Ginger* v. *Circuit Court for the County of Wayne*, 372 F.2d 621 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967); *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977); *Jones* v. *Hulse*, 391 F.2d 198 (8th Cir.), *cert. denied*, 393 U.S. 889 (1968); *Doe* v. *Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); *Gately* v. *Sutton*, 310 F.2d 107 (10th Cir. 1962).[8]

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respondents' submissions were judicial orders made in the exercise of a well-recognized and, indeed, traditional judicial function. There was simply no basis for the U.S. Court of Appeals panel to set those findings aside and conclude otherwise.

8 As we noted in our petition for certiorari, some Court of Appeals decisions arguably run contrary to this strong line of appellate precedent. Respondents have relied particularly on *Dasher* v. *Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), and *Ktsanes* v. *Underwood*, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). Even these decisions, however, are problematic. The *Dasher*

The length of the panel majority opinion here under review—which runs to 25 pages and some 79 footnotes just on the issue of jurisdiction over the constitutional claims—is attributable in part to the herculean efforts that were required just to discuss and distinguish the myriad decisions denying federal lower court jurisdiction in local bar matters.[9]

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decision in the Fifth Circuit was issued only as a result of a petition for rehearing by the panel. The panel's original decision reached an entirely different conclusion and was in line with the precedents in this Court and the holdings in other Courts of Appeals. *See Dasher* v. *Supreme Court of Texas,* 650 F.2d 711 (5th Cir. 1981). Moreover, the Fifth Circuit subsequently has indicated that federal District Court jurisdiction in *Dasher* was found only because the plaintiff could not have sought direct review from the state court decision in this Court. *See Howell* v. *State Bar of Texas,* 674 F.2d 1027 (5th Cir. 1982). The *Ktsanes* decision in the Seventh Circuit reached an opposite result from the decision of the same Court, in the same year, in *Grossgold.*

Although we believe that the cases relied on by respondents are distinguishable from the present cases, we also believe that such decisions—to the extent that they authorize lower federal courts to review the bar decisions of state supreme courts—are fundamentally at odds with this Court's controlling precedents and with important principles of comity and federalism.

9 In deciding cases of this kind, some lower courts have drawn a distinction between *de novo* federal court challenges to state bar admission requirements on their face (over which some courts have exercised jurisdiction) and federal proceedings for review of adverse state court rulings in individual cases (over which, it is almost uniformly held, there is no federal jurisdiction). *See Santos* v. *Alaska Bar Association,* 618 F.2d 575 (9th Cir. 1980); *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976).

Whatever the significance or utility of this distinction as a general proposition may be, however, it cannot genuinely be at issue here. The record is abundantly clear, and both District Court Judges expressly found, that the sum and substance of respondents' federal court actions were to obtain review of the prior adverse decisions of the D.C. Court of Appeals in their individual cases. As Judge Harold H. Greene said in the *Hickey* case:

"However the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of defendants' denial of

The decision of the U.S. Court of Appeals in the present cases, in sum, cannot be squared with the statute governing review of decisions of the D.C. Court of Appeals or reconciled with the controlling precedents of this Court (and the relevant precedents in other Circuits) on the question of review. And the deliberate bypass of available remedies, including direct review in this Court, which is countenanced by the decision below, is inconsistent with this Court's decisions in other contexts involving dual court systems. *See, e.g., Middlesex County Ethics Committee* v. *Garden State Bar Association,* 102 S. Ct. 2515 (1982); *Swain* v. *Pressley,* 430 U.S. 372 (1977); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Rooker* v. *Fidelity Trust Co.,* 263 U.S. 413 (1923).

The *Summers* rule has provided a workable procedure up to now for judicial review of decisions by disappointed applicants to state bars. It should be reaffirmed by this Court, rather than discarded in favor of a patchwork system whereby litigants who fail to obtain satisfaction from the highest court of a local jurisdiction can forego the congressionally mandated avenue of review in this Court and simply cross the street to the federal courthouse to begin anew.

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his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested cc ncern essentially the application of the Rule to his own particular case." (Memorandum Order of December 21, 1978; J.A. 143a.)

Judge June Green made the same finding in the *Feldman* case. (Memorandum Opinion of October 24, 1978; J.A. 82a.)

Thus, there is no occasion to decide here whether the District Court would have had original jurisdiction over a constitutional attack on the D.C. Court of Appeals Rule on its face without any prior proceedings in the D.C. Court of Appeals and without regard to the particulars of the *Feldman* and *Hickey* cases.

C. The U.S. Court of Appeals' Decision Also Violates Fundamental Principles of Comity and Federalism

The U.S. Court of Appeals' decision also violates fundamental principles of comity and respect for a local court system that now deserve particular emphasis in the District of Columbia. The unmistakable and consistent trend of congressional legislation for the District in recent years—manifested not only in the Court Reorganization Act but in other legislation as well[10]—has been toward enhancing the local self-government and home rule powers of the District of Columbia government and assimilating the District to a State. Indeed, when it passed the Court Reorganization Act, Congress expressly stated: "The jurisdictional changes will result in a Federal-State court system in the District of Columbia analogous to court systems in the several States." H.R. Rep. No. 907, 91st Cong., 2d Sess. 34-35 (1970).

Bar admission and regulation have always been recognized as matters of peculiarly local concern. As this Court has emphasized:

> "Since the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979). *Accord, Middlesex County Ethics Committee* v. *Garden State Bar Association, supra*, 102 S. Ct. at 2522-23 (1982).

Federal court interference in such matters is not only inappropriate but also unnecessary. The Judges of the D.C. Court of Appeals, like the Judges of state Supreme Courts, are

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10 *See* District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 774 (1973).

bound to uphold and apply the Constitution and laws of the United States just as federal Judges are. *See, e.g., Harper* v. *District of Columbia Committee on Admissions,* 375 A.2d 25 (D.C. 1977). This Court has expressly, and repeatedly, rejected "the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 611 (1975). *Accord, Sumner* v. *Mata,* 449 U.S. 539 (1981).

And this Court has done so not only as a general proposition but also, and very recently, in the specific context of local bar regulation. In its June 1982 decision involving New Jersey bar procedures, the Court said: "Minimal respect for state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Committee* v. *Garden State Bar Association, supra,* 102 S. Ct. at 2521 (1982). (Emphasis in original.)

As Justice O'Connor has said:

> "There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge,* 22 Wm. & Mary L. Rev. 801, 813 (1981).

That statement applies as forcefully to the Judges of the District of Columbia as it does to the Judges of the fifty states. The District of Columbia Court of Appeals has provided a "hospitable forum" for federal constitutional questions throughout its history under the Court Reorganization Act. Yet the panel majority's decision in substance reinstates a presumption that federal constitutional rights cannot be trusted to the Judges of the D.C. Court of Appeals.

The rule against federal jurisdiction in local bar matters is not arbitrary. It rests upon fundamental principles of comity and on the mutual respect that must exist between local and

federal courts in a federal system. As the U.S. Court of Appeals for the Ninth Circuit observed in *MacKay* v. *Nesbett, supra:*

> "The rule serves substantial policy interests arising from the historic relationship between the state judicial systems and the members of their respective bars, and between the state and federal judicial systems." 412 F.2d at 846.

Moreover, although the decision in the U.S. Court of Appeals in these cases turned on the panel majority's conclusion that the proceedings before the D.C. Court of Appeals were "nonjudicial" or "ministerial" in character, 661 F.2d at 1318-19, this Court has stressed that necessarily artificial labels of this kind cannot be controlling when important issues of comity and federalism are at stake. Rather, "the salient fact is whether federal court interference would unduly interfere with legitimate activities of the state." *Middlesex County Ethics Committee, supra,* 102 S. Ct. at 2522 n.12 (quoting *Juidice* v. *Vail,* 430 U.S. 327, 335-36 (1977)). Plainly, the decision here under review sanctions just such interference—in a matter not only of legitimate, but of historic and unusually sensitive, local concern.

The panel majority in the D.C. Circuit recognized, as it was bound to, that the D.C. Court of Appeals "has the same compelling interest as a state supreme court in regulating the bar of its jurisdiction." 661 F.2d at 1308. Yet its decision paid no more than lip service to that compelling interest. The decision below not only sanctions federal interference in matters of purely local concern, but does so in the face of a statute that expressly removes such matters from the purview of the federal courts.

The interference sanctioned by the court below is far-reaching. As Judge Harold H. Greene recognized in his first opinion in *Hickey:*

> "Any order directed to [the D.C. Court of Appeals] or its judges would be a serious intrusion into areas which

> not only are intrinsically matters of local judicial administration and concern but which were deliberately transferred from this Court to defendants' control by the [Court Reorganization Act]." 457 F. Supp. at 586.

The relief sought here by both respondents in the District Court is of a drastic and coercive nature—a mandatory injunction compelling the Judges of the D.C. Court of Appeals to admit them to the D.C. bar examination. Moreover, as exhibited in the record of both cases, the concomitant to the exercise of federal-court jurisdiction sought here is inquiry by disappointed bar applicants into the decision-making processes of the Judges of the D.C. Court of Appeals in promulgating their Rules and rendering their decisions. As indicated, counsel for respondent Hickey initiated just such an ambitious program of discovery from the D.C. Court of Appeals (*see* p. 12, *supra* and J.A. 75a, 84a, 116a), and Mr. Feldman's counsel attempted to do so as well (*see* p. 9, *supra,* and J.A. 50a). Mr. Feldman's counsel has acknowledged that only the dismissal in the *Feldman* case prevented him from pursuing his discovery farther than he did. (Cross-Petition for a Writ of Certiorari in No. 81-1526, p. 14 n.11.)

We are not conjuring up a hypothetical confrontation between the two court systems engendered by the decision below. It is real and tangible, as recognized by Judge Harold H. Greene. Faced with the prospect of presiding personally over a proceeding for review of a decision of the D.C. Court of Appeals, Judge Greene commented to Mr. Hickey's counsel on one of the "problems of federalism" involved:

> "If the Court took jurisdiction, let's look at the interrogatories for example, that you submitted, and I suppose we could get the same or better results by depositions, are we then going to take depositions of each of the nine judges of the D.C. Court of Appeals to see what they think about the difference between law schools and things like that? That is one of the problems of federalism as to whether this Court should get involved in the thought

processes of the judges of that court." (Transcript of Argument, December 11, 1978, p. 22.)

Thus, petitioners are not here to uphold some abstract concept of judicial dignity or mere formalistic deference by one court system to another. As the Conference of Chief Justices pointed out in its brief in support of the petition for certiorari, the decision below has "far-reaching practical consequences" for, and could cause "serious disruption" of, the courts to whom jurisdiction over admission to the bar has been confided throughout the country. (Motion for Leave to File Brief Amicus Curiae and Brief of the Conference of Chief Justices as Amicus Curiae in Support of Petition for Writ of Certiorari, at 3-4.) As the Conference's brief confirms, the need for comity and for recognition of transcendent considerations of federalism is meaningful and exigent in cases such as these.

As we have shown, the principles of comity and federalism which support the federal courts' traditional refusal to become entangled in local bar admissions matters now govern with special force in the District of Columbia, where the allocation of judicial responsibility has been established by Congress itself. The decision below flouts those principles.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals should be reversed insofar as it held that the District Court had jurisdiction to consider the merits of respondents' complaints, and the complaints should be dismissed as ordered by the District Judge in each case.

Respectfully submitted,

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Respondent's Brief

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No. 81-1335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*
Petitioners,

v.

MARC FELDMAN AND EDWARD J. HICKEY, JR.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT MARC FELDMAN

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QUESTIONS PRESENTED

1. Where the District of Columbia Court of Appeals has promulgated a rule governing bar admissions, could respondent bring suit in federal district court challenging the constitutionality of the rule's requirements and implementation after he requested the Court of Appeals to waive the rule and the Court refused such a waiver in an exercise of its administrative discretion?

2. Even if the District of Columbia Court of Appeals acted in a judicial capacity in refusing to waive its admissions requirements, was respondent still entitled to bring suit in federal district court because the questions of federal law he sought to raise were neither presented to nor decided by the Court of Appeals?

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McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims*, 60 Va. L. Rev. 250 (1974) 47

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Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 Ind. L. Rev. 543 (1976) 47

Wright & Miller, *Federal Practice & Procedure* (1981) 43, 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1335

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*
Petitioners,

v.

MARC FELDMAN AND EDWARD J. HICKEY, JR.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT MARC FELDMAN

STATEMENT OF THE CASE

A. Respondent's Qualifications for Bar Membership.

After graduating from college, respondent Marc Feldman chose to obtain a legal education by pursuing a program of law office study.[1] Beginning in October, 1972, he spent over two years as an apprentice to a law firm in Charlottesville, Virginia.[2] The program that Mr. Feldman pursued was

[1] This account of the facts and prior proceedings addresses only Mr. Feldman's case and leaves to the brief of Edward J. Hickey, Jr. an account of the companion case.

[2] Detailed descriptions of respondent's legal training are contained in his Complaint at ¶¶ 9-19, Joint Appendix ("A.") 38a-40a; in his petition to the Court of Appeals, A. 1a-5a; in the letter of his counsel to Chief Judge Newman, A. 6a-14a; and in the opinion of the court of appeals, reprinted in the Appendix to Petition for Writ of Certiorari ("App.") 8a-9a.

approved by Section 54-62 of the Virginia Code, under which persons may qualify for admission to the Virginia Bar by completing a course of law office study in accordance with guidelines adopted by the Virginia Board of Bar Examiners.[3] To augment this program, Mr. Feldman audited courses at the University of Virginia School of Law. He also spent six months as an intern to the Honorable William Bryant of the United States District Court for the District of Columbia.

After completing his apprenticeship, Mr. Feldman passed the Virginia bar examination and was admitted to the Virginia Bar. Subsequently, he passed the Maryland bar examination as well. Although the rules governing admission to the Maryland Bar require graduation from an accredited law school, the Maryland Board of Law Examiners waived this requirement, and Mr. Feldman also became a member of the Maryland Bar. He then worked as a staff attorney with the Baltimore Legal Aid Bureau.

B. Respondent's Application for Bar Membership and Petition to the District of Columbia Court of Appeals.

In 1976, Mr. Feldman became associated with an attorney practicing in the District of Columbia.[4] Accordingly, on November 26, 1976, he submitted an application for membership in the District of Columbia Bar.[5] After appearing informally before the Bar's Committee on Admissions, Mr. Feldman was advised that his application had been rejected. As the Committee explained, Rule 46 I of the D.C. Court of Appeals required all members of the Bar to be graduates of a law school accredited by the American Bar Association ("ABA"). In the

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[3] The statute and guidelines are reprinted at A. 45a-48a.

[4] Mr. Feldman is presently an Associate Professor at the Rutgers Law School in Camden, New Jersey.

[5] Mr. Feldman originally sought admission without examination under provisions of Rule 46 I which permitted attorneys licensed in other jurisdictions to "waive" into the D.C. Bar. These provisions were later rescinded.

Committee's view, only the Court itself was authorized to waive this requirement. A. 4a.

As a result of this determination, Mr. Feldman submitted a petition directly to the D.C. Court of Appeals.[6] This petition, dated June 13, 1977, contained a detailed description of his background and qualifications. A. 1a-5a. It asked that Mr. Feldman be "waived" into the Bar without examination or, in the alternative, receive permission to take the District of Columbia bar examination. A. 5a. Citing the Committee's advice that only the Court could grant exemptions from Rule 46 I, Mr. Feldman acknowledged that the "wording of Rule 46" precluded his admission but asked the Court to exercise its discretion by waiving the Rule in his behalf. A. 4a.

As the court below stressed, Mr. Feldman's petition made no effort to challenge the validity of Rule 46's requirement of graduation from an approved law school. App. 42a-43a. Moreover, neither Mr. Feldman nor the Court treated his petition as a formal pleading. The petition named no respondent, cited no legal decisions and was not signed by an attorney. Upon its receipt, the Court assigned no docket number to the petition, set no schedule for briefing or oral argument, and made no attempt to solicit relevant evidence.

Nine months passed without any action on the petition. Concerned by this delay, Mr. Feldman retained counsel, who sent a letter dated March 10, 1978, to the Honorable Theodore Newman, Jr., Chief Judge of the Court of Appeals. A. 6a-14a. The purpose of this letter, which was addressed to Judge Newman's chambers, was to emphasize the importance of acting expeditiously on Mr. Feldman's request for a waiver of Rule 46 I and to reiterate the grounds for granting it. A. 9a. Accordingly, the letter summarized Mr. Feldman's extensive

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[6] A. 1a-5a. The treatment of Mr. Feldman's application to the Committee on Admissions and the filing of his petition are recounted in his Complaint at ¶¶ 19-25, A. 40a-41a, and in the opinion of the court of appeals, App. 19a.

legal training, qualifications and experience. A. 7a-8a. Citing "the abundant evidence of [Mr. Feldman's] fitness to practice law," the letter stressed the Court's discretionary power to grant bar admission to deserving applicants:

> Under Section 11-2501 of the District of Columbia Code, the Court has plenary power to regulate the licensing of attorneys in the District. This power plainly includes the discretion to waive the requirements of Rule 46 in a deserving case. Clearly, Mr. Feldman's unusually high qualifications provide an ideal occasion for the exercise of such discretion. A. 9a.

Nowhere did the letter seek any relief beyond a waiver of Rule 46 I; unlike Mr. Feldman's Complaint in the district court, his counsel did not request a declaration that the Rule was invalid or an injunction against its application.

In his letter, Mr. Feldman's counsel also pointed out that serious questions of federal law would be raised if the Court refused to consider Mr. Feldman's individual qualifications because he had not graduated from an ABA-approved law school. A. 10a-13a. However, the obvious purpose of this brief legal discussion was not to solicit a judicial ruling on the validity of Rule 46 I. Counsel specifically noted that Mr. Feldman had asked the D.C. Court of Appeals merely to invoke its administrative powers and stressed that he simply wanted to advise the Court of the possible legal implications of a refusal to exercise those powers on Mr. Feldman's behalf:

> We hope that the Court will grant Mr. Feldman's petition as an exercise of its inherent *supervisory power* over the practice of law. If the Court is not inclined to take that course, *it should be aware that serious legal implications are raised* by any bar admissions procedure which automatically rejects applicants who have not graduated from an A.B.A. accredited law school, without an opportunity to show that their experience and education provide equivalent evidence of their fitness to practice law. A. 10a (emphasis added).

Thus, counsel was simply cautioning that, if the D.C. Court of Appeals refused to waive Rule 46 I on Mr. Feldman's behalf, he

was prepared to challenge the Rule in the United States District Court. As the letter states explicitly: "Barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school *would raise important questions* under the United States Constitution and the federal antitrust laws—*questions that Mr. Feldman is prepared to pursue in the United States District Court if necessary.*" A. 7a, (emphasis added).

On March 30, 1978, the D.C. Court of Appeals issued a one-sentence Order which stated that "the petition of Marc Feldman to waive the provision of Rule 46" had been considered and denied. A. 18a. The Order contained no indication that the Court had also considered and rejected a challenge to the validity of Rule 46. Accompanying the Court's Order was a letter dated March 29, 1978, from Chief Judge Newman to Mr. Feldman's counsel. A. 16a-17a. That letter observed that the Committee on Admissions "recognizes that Mr. Feldman's record indicates that he has had an exceptional opportunity for training and is a personable, impressive and outstanding individual." A. 16a. However, the letter then stated that, in the Court's view, "an objective and reasonable standard as prescribed by [Rule 46] must be utilized" and, thus, "the Court has concluded that its rules should not be waived." A. 16a-17a. Like the Court's Order, Judge Newman's letter contained no hint that the Court was ruling on the merits of a challenge to Rule 46.

C. Mr. Feldman's Complaint in the District Court.

Mr. Feldman filed suit in the district court on May 26, 1978. His Complaint challenges the validity of Rule 46 I both on its face and as administered by the D.C. Court of Appeals. A. 35a-44a.

To support the first prong of this challenge, the Complaint invokes the Fifth Amendment to the United States Constitution. Because Rule 46 I defers totally to the accreditation decisions of the ABA, the Complaint alleges that it impermissibly delegates the D.C. Court of Appeals' authority

to regulate the practice of law to a private entity. A. 42a. In addition, by creating an irrebuttable presumption that only graduates of law schools approved by the ABA are fit to practice law in the District of Columbia, Rule 46 I is alleged to deny equal protection of the laws to persons who have pursued alternative methods of legal training. *Id.*[7]

The second major claim in Mr. Feldman's Complaint is that the D.C. Court of Appeals and its predecessor courts have administered the Rule in an arbitrary and discriminatory manner. According to the Complaint, Rule 46 I has repeatedly been waived to permit the admission of other persons who did not graduate from accredited law schools yet the D.C. Court of Appeals has ceased granting waivers without explaining or justifying this shift in policy. A. 41a, 43a. Because of this established practice of waiving Rule 46 I on behalf of other applicants, the Complaint alleges that the Court of Appeals' refusal to consider Mr. Feldman's individual qualifications was discriminatory and that, even if Rule 46 I is valid on its face, the Court's administration of the Rule constitutes a denial of equal protection. Complaint, ¶ 28(e), A. 43a.

D. The Decisions Below.

To develop evidence to support his challenge to the administration of Rule 46 I, respondent served petitioners with a narrowly focussed set of interrogatories and document requests on June 30, 1978. A. 50a-59a. By this discovery, respon-

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[7] Paragraphs 29-32 of the Complaint also allege that, in these respects, the Rule unduly restricts entry into the legal profession in violation of the Sherman Act. A. 43a. The court below held that Mr. Feldman's antitrust claims should be dismissed as insubstantial because the D.C. Court of Appeals is exempt from antitrust scrutiny as an instrumentality of the sovereign. App. 26a. This Court denied Mr. Feldman's cross-petition for a writ of certiorari to review the court of appeals' disposition of his antitrust claims. 102 S. Ct. Rptr. 3483 (1982). Accordingly, the propriety of dismissing those claims is not now before the Court.

dent sought to obtain further information about petitioners' treatment of other applicants who had not graduated from law schools approved by the ABA.[8]

On October 3, 1978, District Judge June Green stayed discovery pending a decision on petitioners' motion to dismiss. Then, on October 24, 1978, Judge Green filed her Order and Memorandum Opinion dismissing the Complaint for lack of subject-matter jurisdiction. A. 78a-83a. Judge Green concluded that, by refusing to waive Rule 46 I, the D.C. Court of Appeals had acted in a "judicial" capacity and thereby "ruled" on Mr. Feldman's federal claims. For this reason, Judge Green held, the issues of federal law raised by Mr. Feldman's Complaint could not be adjudicated by the district court but could

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[8] The discovery that Mr. Feldman has sought in the district court would impose far smaller burdens than petitioners assert. For example, respondent's interrogatories seek merely to determine (1) the identities and qualifications of all persons admitted to the D.C. Bar or permitted to take the bar examination without graduating from an ABA-approved law school, (2) the considerations supporting the decision to admit these persons to the Bar or permit them to take the bar examination, (3) the identities of other persons who had been denied admission to the bar because they had not graduated from an approved law school, (4) the circumstances surrounding the Court's waiver of Rule 46 I for graduates of the International School of Law, and (5) the independent efforts of the Court or the Committee on Admissions to examine the quality of legal education provided at accredited law schools. A. 50a-59a.

None of these matters relates to the Court's performance of its judicial functions; instead, they relate to the Court's *administration* of the bar admissions process. In civil rights suits against non-judicial state officials, such discovery into the nature and scope of administrative decision-making would be permitted as a matter of course. Moreover, if the D.C. Court of Appeals had fully explained the basis for its admissions decisions as it normally does in connection with its judicial decisions, an inquiry into its decision-making process would be unnecessary.

be pursued only by petitioning this Court for a writ of certiorari. A. 82a-83a.

On July 23, 1981, the court of appeals reversed Judge Green's decision in a lengthy opinion by Judge Spotswood Robinson. App. 1a-60a. In that opinion, the court reviewed the long line of decisions of this Court which hold that a "determination of whether a tribunal has acted in a judicial capacity turns on the character of the proceeding and the nature of its outcome," rather than the tribunal's status as a court. App. 30a. The court then stressed that "only orders which declare or enforce rights or liabilities rise to the level of judicial action." App. 36a. As the court found, Mr. Feldman never "asserted any sort of *right* to be admitted to the District of Columbia bar" but simply "asked the court to do no more than except the petitioner from the operation of [Rule 46 I]." App. 40a (emphasis in original). While acknowledging that Mr. Feldman's petition was predicated in part "on a perception that the rule was unjust in its application to him and was possibly unlawful," the court emphasized that he "expressly reserved this legal claim for possible adjudication on another day and in another forum." App. 47a.

The court of appeals summarily rejected appellants' argument that Mr. Feldman's claims were barred by the doctrine of *res judicata*. As the court held, since "the proceeding in the Court of Appeals was nonjudicial in nature, its outcome cannot be *res judicata* in a subsequent judicial action." App. 52a.

Because petitioners have portrayed the D.C. Circuit's decision as having sweeping consequences, that court's careful summary of the narrow basis of its ruling bears quotation. The court wrote:

> Lest our decision be interpreted too broadly, we pause to summarize precisely what we have said. In these cases, appellants petitioned the District of Columbia Court of Appeals only to waive on their behalf one of its requirements for admission to the bar. They did not seek review by the Court of Appeals of the decision of any other body or individual; they did not request the court to invalidate

> any rule, nor did they ask for anything as a matter of right. Consequently, the orders of the Court of Appeals denying the petitions were administrative, not judicial, in nature. In this millieu, given that appellants' constitutional claims are not insubstantial, the District Court had jurisdiction over the subject matter of both actions, and the doctrine of *res judicata* interposes no bar to the prosecution of either.

App. 52a-53a.

SUMMARY OF ARGUMENT

The decision of the court below was clearly correct and should be affirmed.

1. In his Complaint, Mr. Feldman has alleged that the standards for bar admissions adopted by the D.C. Court of Appeals violate his rights to equal protection and due process under the Constitution. Because Mr. Feldman's claims arise under the laws of the United States, they are within the subject-matter jurisdiction of the district court. The fact that the bar admissions requirements that Mr. Feldman challenges were adopted by judges cannot alter this conclusion. This Court has repeatedly held that the actions of the state judiciary are subject to scrutiny by the lower federal courts when those actions are alleged to violate constitutional rights. Indeed, only recently, the Court upheld the power of a federal district court to decide the constitutionality of bar disciplinary rules adopted by the Supreme Court of Virginia. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980).

The District of Columbia Court Reorganization Act of 1970 does not deprive the district court of jurisdiction over Mr. Feldman's claims. The purpose of that Act is merely to place the District of Columbia judiciary on the same footing as court systems in the states. Nothing in the Act strips the lower federal courts in the District of Columbia of their traditional power to examine the actions of local officials that are challenged under federal law. Nor can principles of comity and federalism bar the district court from considering Mr. Feldman's claims. With certain narrow exceptions not relevant

here, this Court has repeatedly stressed "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976).

2. To justify depriving Mr. Feldman of a federal forum, petitioners argue that, by refusing to waive Rule 46, the D.C. Court of Appeals took "judicial" action and thereby "ruled" on Mr. Feldman's federal claims. Under these circumstances, petitioners argue, Mr. Feldman could only have pursued his federal claims by asking this Court to review the D.C. Court of Appeals' decision.

To support their position, petitioners rely on cases holding that, where state courts have *adjudicated* issues of federal law relating to bar admission or exclusion, their decisions are only reviewable in this Court. These cases, while unquestionably correct, are totally inapposite here. The D.C. Court of Appeals did not act in a "judicial" capacity when it denied respondent's petition, and it never considered or decided the issues of federal law that Mr. Feldman later raised in the district court.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), the Court held that not every action by a court is judicial in character and that, when courts act in a legislative or administrative capacity, they do not adjudicate a case or controversy capable of appellate review. "A judicial inquiry," the Court explained, "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." 211 U.S. at 266.

In *In re Summers*, 325 U.S. 561 (1945), the Court applied this analysis to a dispute over bar admissions. There, the Court emphasized that, before proceedings can be considered judicial, "[a] declaration on rights as they stand must be sought . . . ." 325 U.S. at 567. This standard was met, the Court found, only because Summers had argued in the Illinois Supreme Court that it would be unconstitutional to exclude him from the bar and, thus, had asserted "[a] present right to admission to the bar." *Id.* at 568.

The D.C. Court of Appeals' denial of respondent's petition was simply not a "judicial" determination within the meaning of *Summers*. Mr. Feldman's petition in the D.C. Court of Appeals merely sought to invoke that court's administrative power to regulate the practice of law. Acknowledging that the Court's Rule 46 barred his admission to the bar, Mr. Feldman asked the Court to exercise its discretion by waiving the Rule in his behalf. While Mr. Feldman's attorney notified the Court that he was prepared to challenge the validity of Rule 46 I in federal court, Mr. Feldman did not ask the D.C. Court of Appeals to rule on that issue and it was neither briefed, considered, nor decided. Moreover, rudimentary safeguards of the adversary process—such as discovery, an opportunity to present testimony and the right to an oral hearing—were unavailable to Mr. Feldman, and there was neither a formal record nor a written opinion on which Supreme Court review could have been based. Under these circumstances, the denial of Mr. Feldman's petition did not constitute an adjudication of his federal claims, and Mr. Feldman neither could nor should have sought review by this Court.

Under the approach advocated by petitioners, *any* refusal of a state court to grant bar admission would be treated as a "judicial" decision which resolved all possible constitutional questions concerning state admission requirements and precluded their independent examination by a federal district court. Indeed, federal courts would lack jurisdiction even when, as here, the constitutionality of state admission requirements was neither argued nor decided in the state court. Rather, the mere fact that the applicant had sought relief from state authorities before filing suit would bar the district courts from considering the validity of the admissions process under federal law.

The result of such a broad rule would inevitably be to force prospective attorneys to bypass administrative channels for resolving disputes over bar membership and, instead, to press their grievances directly in federal court. Thus, the approach

that petitioners advocate "would not only serve as a trap for unwary plaintiffs who desire a federal tribunal, but encourage competently represented litigants to forego any venture into state jurisdiction to exhaust administrative and judicial procedures on pain of losing their right to a federal hearing." *New Jersey Education Association* v. *Burke*, 579 F.2d 764, 774 (3d Cir. 1978), *cert. denied*, 439 U.S. 895 (1978). If prospective attorneys are discouraged from seeking administrative relief from state authorities, the voluntary settlement of bar admissions disputes would be frustrated, and the federal courts would be burdened with constitutional litigation that could be avoided.

3. Even if the D.C. Court of Appeals' denial of Mr. Feldman's waiver petition could be considered a "judicial" decision, the district court would still have jurisdiction to decide his constitutional claims. Under established principles of *res judicata*, Mr. Feldman cannot be barred from litigating issues that the D.C. Court of Appeals neither considered nor decided. In denying Mr. Feldman's petition, the D.C. Court of Appeals merely refused to exempt him from Rule 46 I's requirement of graduation from an ABA-approved law school. The Court's order did not create any rights or interests that could be impaired by a later determination that the Rule is unconstitutional.

In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the Court held that a federal district court had jurisdiction to enjoin enforcement of an unconstitutional state statute even though the plaintiff had participated in state court proceedings where the constitutional issue could have been raised. The same result should apply here. While Mr. Feldman might have challenged the constitutionality of Rule 46 I in proceedings before the D.C. Court of Appeals, he did not do so, and his Complaint in district court seeks equitable and declaratory relief that will not have retroactive effect or interfere with any vested rights.

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION TO DECIDE THE CONSTITUTIONALITY OF BAR ADMISSIONS REQUIREMENTS ADOPTED BY THE D.C. COURT OF APPEALS.

A. Respondent Has Asserted Claims Arising Under the Constitution.

Admission to the bar is not a matter of "grace and favor."[9] While this Court has long recognized the important interest that state courts have in controlling access to the bar,[10] it has also held that:

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Schware v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).[11] Thus, the bar admission decisions of state courts have been reviewed to ensure protection of such basic constitutional liberties as equal protection,[12] freedom of speech,[13] procedural due process,[14] and freedom of religion.[15]

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[9] Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963), *quoting* Ex Parte Garland, 71 U.S. (4 Wall.) 333, 379 (1867).

[10] *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, ___ U.S. ___, 102 S. Ct. Rptr. 2515, 73 L.Ed. 2d 116 (1982); *and* Ex Parte Secombe, 60 U.S. (19 How.) 9 (1857).

[11] The bar admission decisions of the District of Columbia are subject to the same constitutional restrictions under the First and Fifth Amendments. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

[12] In re Griffiths, 413 U.S. 717 (1973) (exclusion of aliens).

[13] Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (free speech).

[14] Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (right to a hearing on issue of moral character).

[15] In re Summers, 325 U.S. 561 (1945) (exclusion of a conscientious objector).

In this case, respondent Marc Feldman alleges that bar admissions requirements adopted by the D.C. Court of Appeals violate his right to equal protection under 42 U.S.C. § 1981 and the Fifth Amendment.[16] His claim clearly "arises under the constitution, [and] laws . . . of the United States" and, as the court below found, is within the subject-matter jurisdiction of the federal district courts. App 27a-28a, citing 28 U.S.C. § 1331(a).[17]

To be sure, respondent's constitutional claims would also have been within the subject-matter jurisdiction of the D.C. Court of Appeals. *See Harper* v. *District of Columbia Committee on Admissions*, 375 A.2d 25 (D.C. Ct. App. 1977); *and In re Heller*, 333 A.2d 401 (D.C. Ct. App. 1975), *cert. denied*, 423 U.S. 840 (1975). Respondent could have litigated his constitutional claims before the D.C. Court of Appeals and sought review in this Court pursuant to 28 U.S.C. § 1257 if he was dissatisfied with the result. But the fact that respondent could

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[16] Petitioners have attempted to create the impression that respondent's constitutional claims are frivolous. Brief For Petitioners ("Br.") at 4-6. Of course, the merits of respondents constitutional claims are not before the Court at this time. Moreover, the jurisdictional question that *is* before the Court will affect not only respondent's claims but all future constitutional challenges to bar admission rules. Nonetheless, it should be pointed out, as the court below expressly stated, that respondent's constitutional claims on the merits are substantial. App. 53a. Moreover, on facts similar to those alleged by respondent, a number of district courts have recognized the infirmity of state bar admissions requirements. *See, e.g.*, Brown v. Supreme Court of Nevada, 476 F Supp. 86 (D. Nev. 1979); Louis v. Supreme Court of Nevada, 490 F upp. 1174 (D. Nev. 1980). *Cf.* Berger v. Board of Psychologist Exa iners, 521 F.2d 1056 (D.C. Cir. 1975) (invalidating a D.C. law establishing an irrebutable presumption that persons lacking specified academic credentials are unfit to receive a license to practice psychology).

[17] *See also* 28 U.S.C. §§ 1343, 1361, 2201 and 2202.

have followed such a course does not mean that he was required to do so.[18]

As the Court recognized in *Steffel* v. *Thompson*, 415 U.S. 452, 464 (1974), Congress has made the lower federal courts "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[19] The Court has repeatedly held that constitutional challenges to the actions of state officials may be brought in a federal district court without first exhausting state judicial remedies. *Id. See also Monroe* v. *Pape*, 365 U.S. 167, 183 (1961); *Lane* v. *Wilson*, 307 U.S. 268, 274-75 (1939); and *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913).

The fact that the bar admission requirements contested by respondent were adopted by a court does not deprive the federal district courts of jurisdiction. It is well-established that constitutional challenges to state judicial action may be brought in federal district courts. As the Court stressed in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), one of the fundamental purposes for which lower federal courts were established is:

> to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or *judicial*."

Id. at 242, *quoting Ex Parte Virginia*, 100 U.S. 339, 346 (1879) (emphasis added). *Cf. Steffel* v. *Thompson*, 415 U.S. 452 (1974)

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[18] *Compare* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (affirming a district court decision relating to the constitutionality of lawyer advertising rules adopted by a state supreme court), *with* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (reversing a decision by a state supreme court concerning the constitutionality of lawyer advertising rules adopted by that court).

[19] *Id.*, quoting F. Frankfurter and J. Landis, The Business of The Supreme Court 65 (1928) (emphasis added).

(district court may, under certain circumstances, enjoin threatened state criminal prosecutions).

Rules governing the practice of law are no exception to this principle. In *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), the Court upheld the authority of a federal district court to decide the constitutionality of legislative rules concerning lawyer advertising that had been adopted by the Supreme Court of Virginia. Similarly, in *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971), the Court affirmed on the merits a decision by a federal district court reviewing the constitutionality of New York's court-adopted rules relating to bar admissions.[20] Judge Friendly's cogent analysis in the district court decision in *Wadmond* is highly pertinent here:

> We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are. Rather it would seem anomalous that while federal courts could entertain a complaint similar to the plaintiffs' if made with respect to other licensed professions, such as medicine or accountancy, they are powerless with respect to admission to the bar.

Law Students Civil Rights Research Council v. *Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969).

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[20] *Cf.* Leis v. Flynt, 439 U.S. 438 (1979) (reversing on the merits a lower federal court decision concerning the constitutionality of a state court's refusal to admit out-of-state counsel *pro hac vice*).

B. The Jurisdiction of the District Court Over Constitutional Claims Has Not Been Withdrawn by the District of Columbia Court Reorganization Act.

Petitioners argue that the traditional jurisdiction of a federal district court to decide constitutional challenges to the actions of local officials has been revoked by the District of Columbia Court Reorganization Act of 1970, 84 Stat. 473 (1970). Br. at 17. That argument is clearly untenable. The purpose of the Court Reorganization Act is to establish "a Federal-State court system in the District of Columbia analogous to court systems in the several states." *Key* v. *Doyle*, 434 U.S. 59, 64 (1977), *quoting* H.R.Rep. No. 91-907, 91st Cong., 2d Sess. (1970) 35. Nothing in the Act was intended to limit the power of the district courts in the District to decide federal constitutional claims otherwise within their jurisdiction.

D.C. Code § 11-2501 gives the D.C. Court of Appeals authority to adopt rules concerning admission to the bar. The obvious purpose of this provision is to assign the D.C. Court of Appeals the same legislative authority to prescribe bar admissions rules that state supreme courts typically possess.[21] As discussed above, the federal district courts are empowered to review the constitutionality of rules adopted by state courts to regulate the practice of law. Rules adopted by the D.C. Court of Appeals should stand on the same footing. Neither the language nor the legislative history of the Court Reorganization Act contains the slightest hint that Congress intended to confer some special immunity from federal court review on rules adopted by the D.C. Court of Appeals.

D.C. Code § 11-102 provides that final judgements by the D.C. Court of Appeals are reviewable in this Court in accordance with 28 U.S.C. § 1257. Again, the obvious purpose of the

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[21] *Cf.* Supreme Court of Virginia v. Consumers Union, 446 U.S. at 721 (Virginia law authorizes state supreme court to adopt bar admissions rules).

provision is to make it clear that the "Court of Appeals' decisions are reviewable by the Supreme Court on the same basis as those emanating from the states." *Thompson* v. *United States*, 548 F.2d 1031, 1034 (D.C. Cir. 1976). No provision of the statute expands the Court's jurisdiction by empowering it to review administrative or legislative actions of the D.C. Court of Appeals. And no provision of the statute implies that such actions could not be challenged under federal law in the district courts.

Petitioners have accused the D.C. Circuit of improperly attempting to recapture its former appellate jurisdiction over the D.C. Court of Appeals and suggest that a "rebuff" is needed. Br. at 18-19 & n.15. Nothing could be further from the truth. The opinion of the D.C. Circuit reflects scrupulous concern for the independence of the D.C. Court of Appeals. Its analysis treats the D.C. Court of Appeals as if it were the supreme court of a state. But the D.C. Circuit recognized, as this Court has held, that lower federal courts have jurisdicton to decide constitutional challenges to legislative rules adopted by state courts. Rules adopted by the D.C. Court of Appeals are no different.

C. Neither Federalism Nor Comity Warrants Depriving Respondent of a District Court Forum for His Constitutional Claims.

Invoking principles of comity and federalism, petitioners argue that the lower federal courts should refrain from reviewing state bar admission requirements under federal law because state courts have a strong interest in regulating their own affairs. Br. at 25-29. In substance, this argument is nothing more than a plea against the exercise of federal court jurisdiction in cases involving admission to the bar.

This Court has never held that the lower courts should refrain from discharging their responsibility to apply federal law merely because a state governmental body believes its decisions involve "matters of purely local concern." Br. at 27. On the contrary, the Court has emphasized the "virtually unflagging obligation of the federal courts to exercise the

jurisdiction given them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976).[22] The only exceptions to this established principle are "extraordinary and narrow." *Id.* at 813. A district court may be required to abstain from the exercise of its jurisdiction where difficult questions of state law are presented that would be better resolved, at least initially, by state courts. *Id.* In addition, abstention may be appropriate when the exercise of jurisdiction would interfere with a pending criminal case,[23] or a pending civil case in which important state interests are involved.[24]

None of these grounds for abstention exists here.[25] There has never been any dispute about the meaning of the bar admission rule that is the subject of respondent's constitutional challenge. Nor are there pending criminal or civil cases in the District of Columbia courts concerning the constitutional claims that are at issue in this case.[26] As the Court noted in

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[22] *See also* England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415 (1964); *and* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821) (Marshall, J.).

[23] Younger v. Harris, 401 U.S. 37 (1971) (pending criminal case).

[24] Middlesex County Ethics Committee v. Garden State Bar Ass'n, ___ U.S. ___, 102 S. Ct. Rptr. 2515, 73 L.Ed. 116 (1982) (pending disbarment proceeding); and Moore v. Sims, 442 U.S. 415, 423 (1979) (pending child custody case).

[25] There is a serious question about the applicability of any of the abstention doctrines to the District of Columbia. The doctrine is based on concern for the relationship between the states and the federal government. As the D.C. Court of Appeals is as much a creation of the Congress as the lower federal courts, the need for such sensitivity would appear to be far smaller. We do not press the point, however, since none of the grounds for abstention is present here in any event.

[26] *Compare Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, (where a state disbarment proceeding is pending, a federal court should abstain).

Steffel v. *Thompson*, 414 U.S. at 462, "the relevant principles of equity, comity, and federalism have 'little force in the absence of a pending state proceeding.' "

Indeed, the D.C. Court of Appeals' desire to regulate bar admissions as it sees fit reinforces the importance of preserving federal court jurisdiction over claims that the Court has acted unconstitutionally. As this Court stressed in *Rose* v. *Mitchell*, 443 U.S. 545, 561 (1979):

> [C]laims that the state judiciary itself has purposely violated the Equal Protection Clause are different. There is a need in such cases to ensure an independent means of obtaining review by a federal court on a broader basis than review only by this Court will permit. A federal forum must be available if a full and fair hearing of such claims is to be had.

It is precisely because the D.C. Court of Appeals has such a strong interest in upholding the validity of its own bar admission rules that an independent forum in the federal district courts should be preserved.

II. THE D.C. COURT OF APPEALS' DENIAL OF MR. FELDMAN'S PETITION TO WAIVE THE BAR ADMISSION RULE DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION.

Before challenging the constitutionality of Rule 46 I in district court, Mr. Feldman petitioned the D.C. Court of Appeals to waive the rule. Petitioners argue that, in denying Mr. Feldman's waiver petition, the Court of Appeals acted in a "judicial" capacity and thereby "ruled" on his federal claims. For this reason, petitioners maintain, the issues of federal law raised by Mr. Feldman could not be litigated in district court but could only be decided by this Court upon the issuance of a writ of certiorari. Br. at 20-21.

If this argument is accepted, Mr. Feldman would be foreclosed from raising important constitutional questions that have never adjudicated by any court and will vitally affect his professional future. The long-term impact of such a holding on

the implementation of bar admissions requirements would be even more unfortunate. Prospective attorneys seeking bar membership would be forced to bypass administrative channels for resolving disputes over admission decisions and, instead, to press their grievances directly in federal court. Thus, a decision of this Court rejecting Mr. Feldman's position would frustrate the voluntary settlement of admissions disputes, generate constitutional litigation that could be avoided, and increase friction between state and federal courts.

This senseless result would be contrary to principles repeatedly affirmed by this Court. The actions of a court will not automatically qualify as "judicial" merely because they have been committed by judges. Rather, this Court's decisions have consistently recognized that courts can also act in a legislative and administrative capacity and that, when they do, they should be treated like all other governmental bodies whose decisions are reviewable in the federal courts. No exception to this principle has ever been created for judicial actions relating to the licensing of attorneys. On the contrary, both this Court and the lower federal courts have held that the adoption and implementation of bar admission requirements are not inherently "judicial" functions but may represent an exercise of legislative or administrative power.

To be sure, a decision by the D.C. Court of Appeals *adjudicating* Mr. Feldman's federal claims would have been reviewable only in this Court, as numerous decisions have correctly held. But that is not this case. Here, the Court of Appeals' rejection of Mr. Feldman's petition plainly lacked the attributes of a "judicial" decision. During proceedings before the Court, no adverse parties appeared to contest disputed issues of fact or law; no record was developed; no ruling on legal issues was requested; no briefs were filed; and no decision was rendered that a higher court could review. Thus, the D.C. Court of Appeals did not "decide" a case or controversy; rather, it simply declined to exercise its administrative discretion on Mr. Feldman's behalf.

A. This Court Has Consistently Recognized That Judges May Act in a Non-Judicial Capacity.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), the Court upheld the power of the district court to enjoin proceedings of the State Corporation Commission of Virginia, a body which possessed judicial powers under state law. The Court rejected the principle that, because it performed judicial functions, the Commission's rate-making activities were inherently "judicial." As the Court explained, the status of a tribunal's actions depend on the character of the proceeding and the nature of its outcome, not on whether the decision-making body was "at another moment, or in its principal or dominant aspect, . . . a court . . ." (*id.*, at 226):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hard looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind . . ..
>
> Proceedings legislative in nature are not proceedings in a court within the meaning of [the anti-injunction statute], no matter what may be the general or dominant character of the body in which they may take place . . . . *That question depends not upon the character of the body but upon the character of the proceedings* . . ..

211 U.S. at 226 (emphasis added).

The Court confirmed this principle in *Public Service Co.* v. *Corboy*, 250 U.S. 153 (1919). At issue in *Corboy* was the jurisdiction of the lower federal courts to enjoin construction of a drainage project undertaken under the supervision of an Indiana state court. Holding that the state court's actions were

non-judicial in character and therefore subject to challenge in federal court, the Court emphasized that:

> [A]lthough the Constitution did not limit the power of the States to create courts and to confer upon them such authority as might be deemed best for state purposes, *that right could not, by its exertion, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which in their constitutional sense were non-judicial in character and therefore not within the implied or express limitation by which courts of the United States were restrained from staying judicial proceedings in state courts.* To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject-matter with which they are called upon to deal, but merely upon a state classification.

250 U.S. at 162 (emphasis added).

More recently, in *Roudebush* v. *Hartke*, 405 U.S. 15 (1972), the Court upheld the district court's jurisdiction to enjoin implementation of a state court's decision to appoint a recount commission in a close Senatorial election. The Court rejected the argument that the state court's actions were judicial in character and, hence, immune from challenge in the lower federal courts:

> The exercise of these limited responsibilities does not constitute a court proceeding . . . within the test of *Prentis:* . . . The state courts' duties in connection with a recount may be characterized as ministerial, or perhaps administrative, but they clearly do not fall within this definition of a "judicial inquiry."

405 U.S. at 21. This principle is consistent with numerous decisions of this Court and the lower courts which hold that various actions by judges do not qualify as "judicial." *See, e.g.*, *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Ex parte Virginia*, 100 U.S. 339 (1879); *Armstrong* v. *Maple Leaf Apartments, Ltd.*, 508 F.2d 518 (10th Cir. 1974); *Central Elec-*

tric & Gas Co. v. *City of Stroumburg*, 192 F. Supp. 280 (D. Neb. 1960), *aff'd*, 289 F.2d 217 (8th Cir. 1961). *Cf. Chandler* v. *Judicial Council*, 398 U.S. 74, 86 (1970).

Indeed, it is settled that, where a court acts in a non-judicial capacity, its determinations are *not* subject to appellate review. In *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464 (1930), this Court held that it lacked jurisdiction to review a licensing decision of the then-D.C. Court of Appeals under the Radio Act of 1927.[27] In reaching this conclusion, the Court emphasized that Congress had assigned that court unqualified discretion to modify the Radio Commission's licensing actions. As a result, the Court held, the D.C. Court of Appeals was acting as a "superior and revising agency," 281 U.S. at 467, and its actions were "not judicial in the sense of the Constitution," *id.* at 468. The licensing decision being challenged, the Court concluded, was not reviewable because it was "not a case or controversy in the sense of the judiciary article, but was an administrative proceeding." *Id.* at 470.[28]

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[27] The then-D.C. Court of Appeals is now the Court of Appeals for the District of Columbia Circuit.

[28] In 1930, Congress amended the Radio Act to limit the discretion of the D.C. Court of Appeals to modify the Radio Commission's licensing actions. In Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933), the Court held that, in view of this legislative change, it now had appellate jurisdiction over the Court of Appeals' actions under the Radio Act. The Court explained that, because the Court of Appeals was no longer "entitled to revise the Commission's decision and to enter such judgment as the Court may think just", 289 U.S. at 276, "the [new legislation] manifestly demands judicial, as distinguished from administrative, review," *id.*

The contrasting holdings of *Nelson* and *General Electric* illustrate that "judicial" action is characterized by the application of defined legal principles in an adversary proceeding, whereas "administrative" action involves the unfettered exercise of discretion to achieve

B. The Court's Decisions Establish That Regulation of the Practice of Law Is Not a Uniquely Judicial Function.

Petitioners seek to distinguish the above decisions by arguing that, when a state court regulates the practice of law, its actions are inherently "judicial." Br. at 20-21. But the decisions of this Court demonstrate that, here as elsewhere, simplistic labels are to be avoided and that the status of a court's actions will depend on the nature and effect of its proceedings.

Lathrop v. *Donohue*, 367 U.S. 820 (1961) involved a constitutional challenge to an order of the Wisconsin Supreme Court which integrated the Wisconsin bar. Even though the state court's order derived from its power to regulate the practice of law, this Court refused to hold that the order was judicial in character:

> The State Supreme Court's action disposed of no litigation between parties. Rather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future . . . . As such, the action had the characteristics of legislation.

367 U.S. at 827.

The Court reached a similar conclusion in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), which upheld the district court's jurisdiction to enjoin the Virginia court's disciplinary rules governing attorney advertising. Despite the holding of the district court that adoption of these rules was a "judicial function," the Court found that "propounding the Code was not an act of adjudication but one of

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goals that the decision-maker considers desirable. *Cf.* Osborn v. The Bank, 22 U.S. (9 Wheat) 738, 819 (1824) (the judicial power "is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law"). As discussed below, Mr. Feldman's petition to waive Rule 46 I clearly called for administrative, not judicial, action.

rulemaking," and that the challenged actions of the Virginia court had therefore been committed in its "legislative capacity." 446 U.S. at 731.

An identical analysis has been employed by several lower courts to uphold federal court jurisdiction over suits challenging the validity of state court rules governing bar admission. The Tenth Circuit, for example, has stated that "federal courts . . . exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rulemaking authority or the administration of the rules . . . ."[29] The Ninth Circuit has adopted a similar doctrine,[30] as have numerous district courts.[31] Indeed,

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[29] Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977). *Accord*, Younger v. Colorado State Board of Law, 625 F.2d 372, 375-76 (10th Cir. 1980).

[30] Santos v. Alaska Bar Association, 618 F.2d 575, 577 (9th Cir. 1980) (lower courts have "jurisdiction to review the constitutionality of state adopted rules and regulations governing admission to the legal profession").

[31] Rapp v. Committee on Professional Ethics & Conduct, 504 F. Supp. 1092, 1097 (S.D. Iowa 1980) ("[i]n promulgating and amending disciplinary rules regulating the practice of law in a state, the state's supreme court is exercising a legislative function"); Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392, 1395 (D. Hawaii. 1971) (per curiam) (district court may exercise "jurisdiction over a challenge on constitutional grounds to state bar admission requirements, whether prescribed [by] state statute, or by administrative or court rule"); Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1353 (E.D.N.C. 1970) ("we hold that federal district courts have jurisdiction . . . to consider claims arising out of the application by state officials of a general bar admission requirement that is alleged to be unconstitutional on its face"). *See also* Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Louis v. Supreme Court, 490 F. Supp. 1174 (D. Nev. 1980).

there are scores of reported lower court cases where challenges to bar admission requirements were decided on their merits without any hint that the court lacked jurisdiction.[32]

This case is indistinguishable from the many other decisions reviewing the validity of state bar requirements. Rule 46 I of the D.C. Court of Appeals establishes principles of general applicability concerning admission to the D.C. Bar. In adopting the Rule, the Court was acting in a legislative rather than a judicial capacity. Thus, like the disciplinary rule at issue in *Consumers Union*, Rule 46 I is plainly subject to challenge in federal district court. Mr. Feldman's efforts to avoid litigation by seeking a waiver of the rule before filing suit cannot change this conclusion. A rule adopted in an exercise of a court's legislative powers cannot lose that status merely because the plaintiff sought administrative relief from the rule's application before challenging it in federal court.

C. This Court's Decision in *In Re Summers* Demonstrates That the D.C. Court of Appeals' Denial Of Mr. Feldman's Petition Was Administrative in Character.

Petitioners rely on *In re Summers*, 325 U.S. 561 (1945) to demonstrate that the D.C. Court of Appeals' denial of Mr.

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[32] *See, e.g.*, Poats v. Givan, 651 F.2d 495 (7th Cir. 1981); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); O'Neal v. Thompson, 559 F.2d 485 (9th Cir. 1977); Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), *cert. denied*, 385 U.S. 960 (1966); Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Taylor v. Kentucky State Bar Ass'n, 424 F.2d 478 (6th Cir. 1970); Goldsmith v. Pringle, 399 F. Supp. 620 (D. Colo. 1975); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.), *aff'd mem.*, 419 U.S. 955 (1974); Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974); Brown v. Supreme Court, 359 F. Supp. 549 (E.D. Va.), *aff'd mem.* 414 U.S. 1034 (1973), *rehearing denied*, 414 U.S. 1138 (1974); Harris v. Louisiana State Supreme Court, 334 F. Supp. 1289 (E.D. La. 1971).

Feldman's petition was a "judicial" decision.[21] However, a close examination of *Summers* in fact supports the contrary conclusion.

The petitioner in Summers possessed all the qualifications required to practice law in Illinois but was denied admission to its bar because he was a conscientious objector. After a character committee of the Illinois bar had denied his application, Summers commenced a proceeding against the committee in the Supreme Court of Illinois. That court upheld the committee's decision, rejecting Summers' argument that his conscientious objector status was an impermissible basis under the Constitution for refusing him admission to the bar. Summers then sought review in this Court, which rebuffed a challenge to its own jurisdiction and held that the Supreme Court of Illinois had taken "judicial" action subject to appellate review. *Id.* at 568-69.

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[21] Petitioners also rely on *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867). That case, however, has little bearing on the issues presently before the Court.

The petitioner in *Garland* was a former Confederate officer seeking admission to this Court's bar. In support of his application, Garland challenged a statute which required all persons seeking permission to practice before the Court to affirm that they had never voluntarily borne arms against the United States. The Court declared this statute unconstitutional on the ground that it interfered with the judiciary's power to weigh the qualifications of prospective attorneys. It was in this context that the Court stated that admission to the bar "is not the exercise of a mere ministerial power" but the "exercise of judicial power." 71 U.S. at 378-79.

As the court below stressed, App. 36a-37a and n.154, because Garland was seeking admission directly to this Court's bar, the Court had no occasion to consider the reviewability of the bar admission decisions of state courts. Hence, *Garland* provides no guidance on the issue presented here. Certainly, *Garland* neither holds nor implies that bar admission decisions of state courts are *always* judicial in character and, hence, can only be reviewed in this Court.

In reaching this conclusion, the Court stressed that, before proceedings could be considered judicial, "[a] declaration on rights as they stand must be sought . . . ." *Id.* at 567. This standard was met, the Court determined, because Summers had asserted "[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy." *Id.* at 568. To support this finding, the Court observed that the proceedings before the Supreme Court of Illinois had been adversary in character and were treated as such by all participants. *Id.* at 567. It also emphasized that those proceedings had taken " 'such a form that the judicial power is capable of acting on it.' " *Id.*, quoting *Osborn* v. *Bank*, 22 U.S. (9 Wheat) 738, 819 (1824).

A comparision of this case and Summers illustrates why the D.C. Court of Appeals did not act in a "judicial" capacity when it rejected Mr. Feldman's petition.

1. Mr. Feldman did not assert a "Claim of Right."

Unlike Summers, Mr. Feldman did not assert a "claim of a present right to admission" to the District of Columbia Bar. Rather, both he and his attorney freely acknowledged that he had not graduated from a law school approved by the ABA and, hence, did not satisfy Rule 46 I.[34] His petition focused on his unusual qualifications and asked the Court to waive the Rule and admit him to the District Bar in an exercise of its plenary power over the licensing of attorneys. Mr. Feldman was therefore not seeking a declaration of his legal rights; he was invok-

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[34] Respondent's petition to the D.C. Court of Appeals acknowledged, for example, that the "wording of Rule 46 is such as to prohibit him from gaining admission to the Bar in this jurisdiction." A. 4a. His counsel's letter contained a similar recognition. After pointing out that "the Committee on Admissions has advised Mr. Feldman that Rule 46 I bars him from even taking the D.C. bar examination," the letter acknowledges that this interpretation of the Rule is "correct." A. 9a.

ing the Court's administrative discretion as the body charged by statute with requlating the practice of law in the District of Columbia.

An important element of the Court's analysis in *Summers* was that the claimant had *sought* a judicial determination by challenging the constitutionality of the Illinois admission process in the state's highest court. 325 U.S. at 567. Here, by contrast, neither Mr. Feldman nor the D.C. Court of Appeals treated his petition as a request for a judicial determination.[35] For example, both respondent and the court failed to follow the established procedures for filing and prosecuting appeals in the D.C. Court of Appeals.[36] Similarly, the court took no steps to schedule oral argument on respondent's petition,[37] nor did it issue an opinion or enter a judgment.[38] Indeed, the only document reflecting the court's views on respondent's petition was the letter of Judge Newman to Mr. Feldman's counsel tersely announcing that the petition had been denied.

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[35] Significantly, this Court has held that, in determining whether an act is "judicial," it is necessary to examine "the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." Stump v. Sparkman, 435 U.S. 349, 362 (1978).

[36] Although Rule 15 of the Court's Rules requires docketing of appeals from an administrative order and Rule 16 requires submission of the administrative record, respondent did neither. And although Rule 31 requires briefs to be filed in triplicate within forty days of submission of the record, the letter of respondent's attorney to Chief Judge Newman was not mailed until nine months after respondent's petition was filed and bore no resemblance to the format for briefs prescribed by Rule 28. The Court never expressed any concern that these aspects of its procedures had been disregarded.

[37] Rule 34 of the Court's rules prescribes procedures for calenderizing a case for oral argument.

[38] Under Rule 36(a), the entry of judgment is accomplished by a notation on the court's docket after its opinion has been received by the clerk.

2. The court of appeals' proceeding exhibited none of the elements of an adversary proceeding.

The second factor which supported the Court's finding of "judicial" action in *Summers* was the adversary character of the state proceedings.[39] As the Court has repeatedly emphasized, only the interaction of adverse parties will stimulate the full development of factual and legal issues necessary for an informed decision. *E.g.*, *Poe* v. *Ullman*, 367 U.S. 497 (1961); *and Muskrat* v. *United States*, 219 U.S. 346, 356-57 (1911).

In this case, Mr. Feldman had no reason to view disposition of his petition as an adversary proceeding. The Committee on Admissions never expressed opposition to Mr. Feldman's admission to the bar. He had been told only that the Committee lacked authority to waive Rule 46 I and that an application to the Court itself was necessary. A. 4a. In view of the prior willingness of the D.C. Court of Appeals to waive the Rule for other applicants, Mr. Feldman had no reason to believe that his waiver petition would be denied.

Under these circumstances, Mr. Feldman had no incentive to make a vigorous presentation of the facts and law supporting his constitutional challenge to Rule 46 I. As a result, Mr. Feldman never briefed that issue in any traditional sense,[40] and he certainly never had the opportunity to rebut the arguments of an opposing party.[41] Indeed, by seeking a waiver of Rule 46

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[39] The Court emphasized that the Illinois Committee on Character and Fitness had concluded that Summers was unqualified for admission because he was a conscientious objector, and that Summers styled his petition in the Supreme Court of Illinois as " 'Clyde Wilson Summers, Petitioner, v. Committee on Character and Fitness for Third Appellate District, Respondent.' " 325 U.S. at 567. Thus, in considering Summers' petition, the Supreme Court of Illinois was deciding a dispute between two adverse parties.

[40] Rule 28 of the Rules of the D.C. Court of Appeals provides for an exchange of briefs.

[41] Rule 28(c) of the Court provides for the filing of reply briefs.

I, his motive was to *avoid* an adversary proceeding; as he told the Court, a waiver would eliminate the need for a lawsuit in which the Rule's infirmities under federal law would be at issue. A. 6a-7a.

The D.C. Court of Appeals never alerted Mr. Feldman that its view of the proceeding differed from his own. The Court never requested formal briefs either supporting or attacking Rule 46; it never asked respondent to expand the brief summary of relevant law that his attorney presented; it never provided any opportunity for the development of additional facts; it never gave respondent an opportunity to appear at an oral hearing; and, in rejecting respondent's petition, it never gave any indication that it had considered or decided a challenge to the validity of Rule 46 I.

It is instructive to compare the D.C. Court of Appeals' treatment of Mr. Feldman's petition with its actions in two cases where it ruled on the merits of constitutional claims concerning admission to the bar. *Harper* v. *District of Columbia Comm'n on Admissions*, 375 A.2d 25 (D.C. Ct. App. 1977); *and In re Heller*, 333 A.2d 401 (D.C. Ct. App. 1975), *cert. denied*, 423 U.S. 840 (1975). In *Heller*, the court entered an order to show cause, briefs were exchanged and oral argument was heard. In *Harper*, the Corporation Counsel for the District of Columbia represented the Committee on Admissions and made arguments on its behalf. The Chairman of the Committee also filed an affidavit. In both cases, the Court issued a formal opinion fully analyzing and disposing of the issues presented. The absence of such procedures here is compelling evidence that neither Mr. Feldman nor the Court believed that an adversary proceeding existed.

3. Proceedings before the D.C. Court of Appeals did not take such a form that the judicial power was capable of acting on it.

Summers' third requirement for "judicial" action is that the proceedings take " 'such a form that the judicial power is capable of acting on it.' " 325 U.S. at 567, *quoting Osborne* v.

Bank, 22 U.S. (9 Wheat) 738, 819 (1824). At a minimum, this requirement entails the existence of a case or controversy and the development of a record which refines the relevant factual and legal issues and organizes them for appellate review. *See, e.g., Muskrat* v. *United States*, 219 U.S. 346, 358-59 (1911); *Naim* v. *Naim*, 350 U.S. 891 (1955) (per curiam); *and Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1947).

These attributes of a judicial proceeding were wholly lacking here. In stark contrast to *Harper* and *Heller*, no claim of right was ever made by respondent, and no procedures were afforded by which he could develop evidence. Thus, Mr. Feldman had no opportunity to present favorable testimony, to cross-examine adverse witnesses, or even to make oral arguments on his behalf. As a result of these deficiencies, no record exists for appellate review and there is no opinion by the D.C. Court of Appeals. Thus, even if respondent had sought a writ of certiorari, meaningful scrutiny of his claims by this Court would have been impossible.[42]

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[42] There is another basic reason why respondent's challenge to Rule 46 I was not suitable for judicial resolution by the D.C. Court of Appeals. One of respondent's claims in the district court is that he has been subjected to unconstitutional discrimination because the court has waived Rule 46 I on behalf of other applicants who did not graduate from approved law schools but refused to waive the Rule for him. Until respondent applied for and was denied a waiver, however, he had not sustained sufficient harm from the court's implementation of Rule 46 I for this claim to be ripe for judicial review. *See, e.g.*, United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); *and* International Longshoremen's Union Local 37 v. Boyd, 347 U.S. 222 (1954).

Thus, the D.C. Court of Appeals' refusal to grant respondent a waiver represents the very act of discrimination which he now seeks to challenge in the district court. By definition, this claim could only have assumed a form "suitable" for judicial consideration *after* the D.C. Court of Appeals had acted on his petition.

4. The letter of Mr. Feldman's counsel did not alter the administrative character of his petition.

To demonstrate the "judicial" nature of the D.C. Court of Appeals' order, petitioners rely on the letter of Mr. Feldman's counsel to Chief Judge Newman. Br. at 7. However, the court below properly found that counsel's letter did not alter the administrative character of Mr. Feldman's petition. App. 43a-47a.

The purpose of counsel's letter, written nine months after Mr. Feldman's petition was filed, was merely to expedite action on that petition. Nowhere did the letter ask the Court to revoke or suspend Rule 46 I because of its illegality. Moreover, while the letter briefly identified the legal grounds on which Mr. Feldman was prepared to challenge Rule 46, it specifically stated that respondent intended to press this challenge in the district court, not the D.C. Court of Appeals. As the letter emphasized: "Barring Mr. Feldman from the practice of law merely because he has not graduated from an accredited law school would raise important questions . . . *that Mr. Feldman is prepared to pursue in the United States District Court if necessary.*" A. 7a (emphasis added).[43]

The Court of Appeals' Order denying Mr. Feldman's petition merely purported to deny a "waiver" of Rule 46. There is no hint in the Order that the Court believed it was sustaining the

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[43] While petitioners characterize counsel's letter as a "brief" (Br. at 7), this claim is belied by the cursory nature of the legal discussion which the letter contains. At issue in this case is Mr. Feldman's entitlement to practice law in the District of Columbia. Considering the importance of this matter, Mr. Feldman would not have rested his entire legal challenge to Rule 46 on a terse two page legal discussion if he believed litigation of that issue would thereafter be foreclosed. Similarly, the Court itself would not have issued an order which did not mention, let alone discuss, the validity of Rule 46 under federal law if it believed that its decision would be reviewable, if at all, only in the Supreme Court.

Rule against a challenge based on the Constitution. Indeed, the logical implication of the Court's silence on this issue is that it believed the issue would be decided in the district court—the forum which respondent's counsel specifically announced he would invoke if the petition were denied.

This Court has emphasized that, even in proceedings that are clearly judicial in character, a plaintiff seeking a determination of state law may notify the state court of applicable issues of federal law without submitting those issues for decision. *See Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970); *and England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964). Mr. Feldman followed a similar course here, advising the D.C. Court of Appeals of issues of federal law that might be raised elsewhere but not submitting these issues for decision. The conclusion of the court below on this point could not be more explicit:

> Feldman confined his effort in the Court of Appeals to a request for a waiver—not adjudication of the validity—of the rule requiring legal education in ABA-approved schools, and the court's order did not go beyond the limited scope of that request. The order, we have said, was distinctly nonjudicial in character . . . .
>
> . . . The Court of Appeals was not requested to review the decision of any other body—indeed, no other entity had the power to grant an exemption—or to originate a decision of its own. To be sure, Feldman argued vigorously that he should be relieved of the requirement of Rule 46 I(b), and predicated part of his reasoning on a perception that the rule was unjust in its application to him and possibly was unlawful. But . . . that sort of communication did not alter the fundamental nature of his endeavor. The vital point is that Feldman did not seek, nor did the court make, any determination respecting the validity of the rule; he merely asked the Court of Appeals to relieve him from it, and expressly reserved his legal claims for possible adjudication on another day in another forum.

App. 46a-47a (footnote omitted).

D. Every Circuit Court to Consider the Question Decided in This Case Has Reached the Same Result as the D.C. Circuit.

The decisions of other circuits adhere fully to the principle embodied in the decision of the court below: where a state court has taken administrative or ministerial action involving bar admissions, its decisions are not reviewable in this Court but must be challenged by an independent suit in the district court.

The appellant in *Ktsanes* v. *Underwood*, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978), had brought suit against the Illinois Supreme Court to challenge a rule denying bar admission to persons who had failed the Illinois bar examination but were licensed in other states. Before filing suit, appellant had unsuccessfully petitioned the Illinois court for an exemption from the rule. The Seventh Circuit held that denial of this petition was not a "judicial" act and, for this reason, did not deprive the district court of jurisdiction:

> When Ktsanes petitioned the Illinois court, the petition was merely one for exemption from the rule, not a challenge of it. There was no "claim of a present right to admission to the bar of a state and a denial of that right" which the *Summers* Court held to create a case or controversy under Article III. Ktsanes never argued the question of the validity of Rule 705(d) before the Illinois Supreme Court. He was asking for ministerial action, not judicial determination. The denial of his petition was made by the court acting in an administrative capacity. That denial did not present a case or controversy cognizable by an Article III court, and, thus, was not appealable to the Supreme Court of the United States.

552 F.2d at 743 (citations omitted).

Employing a similar analysis is *Brooks* v. *Laws*, 208 F.2d 18 (D.C. Cir. 1953), which held that the refusal of the district court to admit the appellant to its bar was not a "judicial" act subject to appellate review. In reaching this conclusion, the court pointed out that *In re Summers* "is an affirmation of the general rule that admission to the bar of a court is a ministerial

act performed by virtue of judicial power" and that "the assertion of a right, in the Summers case a constitutional right, is the point at which [a] case or controversy arises." 208 F.2d at 28. Absent such a claim of right, the court emphasized, denial of an application for admission is merely a "ministerial act performed by virtue of judicial power." *Id.*

Similarly, in *Dasher* v. *Supreme Court*, 658 F.2d 1045 (5th Cir. 1981), the court upheld the jurisdiction of the district court over a suit challenging a Texas bar admission rule which required graduation from an approved law school. Before filing suit, Ms. Dasher unsuccessfully sought a waiver of this requirement from the Supreme Court of Texas. Nevertheless, her waiver petition did not raise the constitutional claims she later asserted in federal court. 658 F.2d at 1051. Under such conditions, the court held, this Court could not have entertained the case because the Court can "review only judgments in state court cases in which a federal issue was raised and adjudicated." *Id.* As a result, the court concluded, Ms. Dasher's suit "does not constitute an impermissible effort to seek review of a state court judgment in a lower federal court." *Id.*[44]

The results reached in these cases and in the decision below are practical and fair. Candidates for bar admission understandably wish to exhaust all possible remedies on the state level before testing the legality of the admissions process in federal court. The refusal of state courts to grant administrative relief from admissions requirements should not preclude the district courts from scrutinizing the legality of those requirements under federal law. Otherwise, applicants for bar admission could present their cases to state bar authorities only on pain of forfeiting the right to litigate their federal claims in the district courts. Apart from its fundamental

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[44] *See also* Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (re-affirming the *Dasher* principle).

unfairness, such a situation would discourage the informal resolution of admissions disputes and cause needless and wasteful litigation in the federal courts.

E. The Supreme Court and Lower Court Decisions Cited by Petitioners All Involve the Review of Adjudications of Disbarment or Admissions Disputes.

Petitioners emphasize that, on a number of occassions, this Court has granted certiorari to review state court decisions concerning bar admissions, thereby recognizing that such decisions were "judicial" in character. Br. at 20. In each of these cases, however, the disappointed applicant for admission had explicitly raised constitutional issues before the state court, and these constitutional claims had been considered and decided on their merits.[45] Thus, this Court was called on to review a state court adjudication of "a present claim of right to admission" to the bar—precisely what the court below found lacking here.

The lower court decisions on which petitioners rely are likewise distinguishable from the present case. In each of these

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[45] *See* In re Anastaplo, 18 Ill. 2d 182, 163 N.E.2d 429 (1960), *aff'd*, 366 U.S. 82 (1961); Konigsberg v. State Bar, 52 Cal. Rep. 2d 749, 344 P.2d 777 (1959), *aff'd*, 366 U.S. 36 (1961); *and* Schware v. Board of Bar Examiners, 60 N.M. 304, 291 P.2d 607 (1955), *rev'd* 353 U.S. 232 (1957).

Indeed, this Court has specifically recognized the consideration of constitutional issues by the lower courts in some of these cases. In Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), the Court noted that the New York Court of Appeals had amended its remittitur to indicate that Willner had presented his constitutional issues and that the state court had passed on and denied those claims. Likewise, in upholding its jurisdiction in Konigberg v. State Bar, 353 U.S. 252, 255 (1957), this Court emphasized that Konigsberg's petition for review to the California Supreme Court alleged that the decision of the bar committee that denied him admission had deprived him of due process and equal protection.

cases, the state court had adjudicated the merits of a fact-based controversy involving disbarment or bar admission, and the aggreived plaintiff's suit in federal court essentially sought review of the state court's decision. Under these circumstances, the lower courts correctly held that the state tribunal rendered a "judicial" decision that was reviewable only in this Court.

For example, several decisions have held that the district courts lack jurisdiction to entertain suits challenging state disciplinary or disbarment orders against lawyers who have engaged in misconduct.[46] These proceedings typically possess all of the attributes of the adversary process. A factual record will be developed on the basis of witness testimony and cross-examination; there will be a formal procedure for making and ruling on legal arguments; and the ultimate decisionmaker will be a neutral body reviewing the actions of another tribunal. In the cases cited by petitioners, these factors have assumed major importance. In fact, the courts have ruled that disbarment orders of state courts are "judicial" acts precisely because of the many attributes of the adversary process that disciplinary proceedings possess.[47] As the court below

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[46] *See* Kimball v. Florida Bar, 632 F.2d 1283 (5th Cir. 1980); Martinez Rivera v. Trias Monge, 587 F.2d 539 (1st Cir. 1978); Grossgold v. Supreme Court of Ill., 557 F.2d 122 (7th Cir. 1977); MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); Jones v. Hulse, 391 F.2d 198 (8th Cir.) *cert. denied*, 393 U.S. 889 (1968); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962).

[47] For example, in *Jones* v. *Hulse*, the Advisory Committee of the Missouri Bar filed "an information" seeking appellant's disbarment because he had allegedly solicited personal injury claims. A special commissioner was appointed to hear testimony and 50 days of hearings were held. Based on a transcript 4,000 pages in length, the commissioner submitted a report to the Supreme Court of Missouri, which then considered appellant's objections and entered an order

observed, "[c]ases precipitated by disciplinary proceedings against lawyers . . . are inapposite because the proceedings challenged therein culminated in *adjudications on the right to engage in law practice*." App. 49a n.200 (emphasis added). Here, by contrast, no comparable *right* to engage in law practice was asserted or adjudicated.

Likewise distinguishable from the present case are the few lower court decisions holding that the district courts lack jurisdiction to entertain challenges to the bar admission actions of state courts. In each of these cases, the disappointed applicant sought federal court review of a particularized admission decision based on the state court's assessment of his specific qualifications; no constitutional challenge to the general standards governing the bar admission process was presented.[48] Indeed, the courts in these cases have expressly recognized that, where a plaintiff has attacked the substance

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disbarring him. After appellant had unsuccessfully sought a writ of certiorari, he brought suit in federal district court, alleging that certain evidentiary rulings by the commissioner deprived him of due process. In upholding the district court's decision that it lacked subject-matter jurisdiction, the Eighth Circuit emphasized the adversary character of the state court proceedings:

> The alleged denial of due process and violation of appellant's other constitutional rights as well as the deprivation of his civil rights . . . were fully considered by the Supreme Court of Missouri . . . [T]he procedures in the Missouri Court conformed to the Rules of that Court. The duly constituted Advisory Committee acted with complete authority. The Supreme Court of Missouri responsibly discharged its functions and entered a judgment which is responsive to and adequately supported by competent evidence.

391 F.2d at 201-02.

[48] Diaz-Buxo v. Trias Monge, 593 F.2d 153 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979); Woodard v. Virginia Bd. of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980).

or overall implementation of the state's general criteria for bar admission, the district courts are not barred from exercising jurisdiction.[49]

Mr. Feldman's case fits precisely within this framework. Mr. Feldman's Complaint does not challenge an adjudication that he is unfit to practice law.[50] Instead, it challenges the adoption and overall administration of a rule denying admission to all persons who have not graduated from an ABA approved law school, regardless of their individual qualifications. Under the decisions of this Court and the lower courts, the district court plainly had jurisdiction to entertain these claims.

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[49] *See* Doe v. Pringle, 550 F.2d at 597; Brown v. Board of Bar Examiners, 623 F.2d at 609.

As these cases recognize, federal courts have jurisdiction to consider claims that a state court's *administration* of bar admission requirements is marred by a systematic bias or flawed in some other fundamental respect. Here, Mr. Feldman's Complaint alleges not only that Rule 46 I is unconstitutional on its face but that the D.C. Court of Appeals has administered the Rule in an unconstitutional manner. The basis for this latter claim is the abrupt, unexplained and seemingly random decision by the Court to deny all waiver applications after a long history of granting waivers to persons who did not graduate from accedited law schools. *See* A. 9a-10a. Clearly, such a general challenge to a court's implementation of the admission process satisfies the jurisdictional standards articulated in cases such as *Doe* and *Brown*.

[50] As the letter of its Chief Judge indicates, the D.C. Court of Appeals found that he "has had an exceptional opportunity for training and is a personable, impressive and outstanding individual," A. 16a, but it still refused to waive Rule 46 on his behalf.

III. UNDER ESTABLISHED RES JUDICATA PRINCIPLES, THE D.C. COURT OF APPEALS' DENIAL OF A WAIVER CANNOT BAR CONSTITUTIONAL CLAIMS THAT THE COURT DID NOT CONSIDER OR DECIDE.

Even if the D.C. Court of Appeals' refusal to waive Rule 46 I could be considered a "judicial" decision, it would not follow that the district court lacked jurisdiction to decide respondent's constitutional claims. At most, Mr. Feldman was obligated to seek appellate review of those issues that the D.C. Court of Appeals considered and decided; he had no obligation to seek review of issues that were never raised. The waiver proceedings before the D.C. Court of Appeals determined only that the Court would not relieve Mr. Feldman from the application of Rule 46 I in an exercise of its discretion. They did not decide the merits of his constitutional challenge to the substance and implementation of the Rule itself. Under established principles of *res judicata*, these claims can thus still be litigated in the district court.

A. Respondent's Petition in the Court of Appeals and His Complaint in This Action Are Based on Different Causes of Action.

Res judicata does not apply unless the prior and subsequent lawsuits involve the same cause of action. *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Restatement (Second) Judgments*, § 24 (1980); *and Restatement of the Law of Judgments*, § 61 (1942).[51] Various tests have been used to define the scope

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[51] It is universally recognized that a prior decision will bar a subsequent lawsuit only if that decision constitutes a "final judgment." *Restatement of the Law of Judgments* § 41 (1942). As the court below found, a decision will only qualify as a "final judgment" if the court is acting in a judicial capacity. App. 52a. When a court acts in a legislative or administrative capacity, the doctrine of *res judicata* will not apply. Prentis v. Atlantic Coast Line Co., 211 U.S. at 226-27; and

of a cause of action. *See generally* 18 *Wright & Miller, Federal Practice & Procedure* § 4407 (1981). The traditional formula is that a cause of action consists of the "violation of a single right by a single wrong." *Id.* at p. 59, *citing Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927).

Under this test, it is clear that respondent's Complaint and his waiver petition embody differ causes of action. The waiver petition did not assert that any right had been violated; it simply asked the D.C. Court of Appeals to exercise its discretionary authority to exempt respondent from a legislative rule governing bar admission. While his counsel's letter alerted the court that respondent was prepared to assert constitutional claims in the district court, respondent never asked the D.C. Court of Appeals to rule on those claims and neither the court's order nor the accompanying letter from Judge Newman contains any evidence that the claims were decided.[52]

Another widely accepted formula for defining a cause of action is set forth in *Herendeen* v. *Champion International Corp.*, 525 F.2d 130, 133-34 (2d Cir. 1975):

> The test for determining whether causes of action are the same for purposes of res judicata has been variously

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United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966). If the Court agrees that the D.C. Court of Appeals was acting in an administrative capacity when it rejected respondent's petition, this would constitute an additional reason why his Complaint in the district court was not barred as *res judicata*.

[52] It is established law that, where there is any doubt on the record whether a question was in fact determined in a prior proceeding, the matter will be open to decision in a subsequent proceeding unless the party seeking to bar consideration proves by extrinsic evidence that the point was decided. Russell v. Place, 94 U.S. 606 (1876); Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951). Absent such extrinsic evidence, this Court is not warranted in holding that the Court of Appeals adjudicated the legal questions raised in the district court by Mr. Feldman's Complaint.

> expressed. Most frequently cited as the relevant criteria by both this court and the New York courts are whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second were present in the first.

See Wright & Miller, § 4407, p. 60.

It is clear that this test, too, could not be satisfied here. In denying respondent's petition for a waiver of Rule 46 I, the D.C. Court of Appeals merely decided that it was unwilling to exempt him from the Rule's requirement of graduation from an ABA-approved law school. The Court's order did not create any rights or interests that could be impaired by a later determination that the Rule was unconstitutional. Respondent's Complaint in district court, by contrast, requests not a waiver of Rule 46 I, but a declaration that the Rule is invalid, both on its face and as administered. In considering this issue, the district court will necessarily address constitutional questions that were not before the D.C. Court of Appeals. It will also explore the prior treatment by the D.C. Court of Appeals of applicants for admission who lack degrees from ABA-approved law schools; this subject, too, was not considered in the waiver proceedings. Since the claims which respondent presses in the district court are fundamentally different from the claims contained in his waiver petition, respondent has asserted a new cause of action.

Finally, the *Restatement (Second) Judgments* § 24 (1980) stresses that, in considering whether causes of action are identical, it is important to examine such factors as "time . . . motivation, . . . [and] the parties' expectations." The *Restatement* further provides that *res judicata* should not apply if

> The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein.

Id., § 26(a)(1). In illustrating this principle, the *Restatement* indicates that, where the defendant is aware of the plaintiff's

intent to file two suits but does not voice any objection, a decision in the first is not *res judicata* in the second because the defendant "consented in effect to the splitting of the claim." *Id.* at p. 235, Illustration 1.

Here, Mr. Feldman's waiver petition clearly put the D.C. Court of Appeals on notice that he considered his waiver application and his constitutional claims to be separate causes of action, and that he intended to pursue his constitutional claims in federal district court if the waiver petition was denied. The D.C. Court of Appeals "acquiesced" in this separation of the two claims because it did not object to Mr. Feldman's proposed course of action and denied the waiver petition without ruling on or referring to his constitutional claims. In fact, the D.C. Court of Appeals first opposed Mr. Feldman's effort to litigate his claims in federal district court *after* he had filed his Complaint and the deadline for seeking certiorari had expired.[53] *See* 28 U.S.C. § 2201. It is difficult to imagine a case that fits more squarely within the principle of the *Restatement*. It would be grossly unfair under these circumstances to hold that the denial of the waiver petition is *res judicata* as to Mr. Feldman's constitutional claims.

B. Res Judicata Should Not Apply to Respondent's Constitutional Claims Because They Have Not Been Decided on the Merits and Seek Only Prospective Equitable Relief Against Government Officials.

In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the Court held that a federal district court had jurisdiction to enjoin enforcement of an unconstitutional state statute even though the plaintiff had twice been convicted in state criminal proceedings where the constitutional defense could have been raised. The Court reasoned that prospective relief would in no way "annul

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[53] The waiver petition was denied on March 30, 1978. A. 18a. Petitioners moved to dismiss on jurisdictional grounds in the district court on July 14, 1978, more than 90 days later. A. 80a.

the results of [the] state trial" since it would have no retroactive effect. *Id.* at 711.

In *Getty* v. *Reed*, 547 F.2d 971 (6th Cir. 1975), two attorneys who had been sanctioned in state disciplinary proceedings sued in federal court for a declaratory judgment that the state statute and regulation under which they had been disciplined were unconstitutional. There was no question that the state proceedings had been judicial; both attorneys had received several hearings before the Kentucky Court of Appeals affirmed the sanctions against them, and both had applied to the United States Supreme Court for a writ of certiorari. The Sixth Circuit nonetheless held that the district court had jurisdiction to entertain the action. It held that a complaint attacking a state statute or regulation and seeking the traditional trial court remedies of declaratory and injunctive relief did not request an exercise of appellate jurisdiction because, unlike an appellate decision, these equitable remedies would not have the effect of declaring the state court judgment itself null and void. *Id.* at 976.

The same result should apply here. Respondent's Complaint in the district court seeks only prospective declaratory and equitable relief, and the merits of his constitutional challenge have never been decided by any court. The relief that is sought will have no retroactive effect and will not interfere with any vested rights. Under the circumstances, "there is no important state interest of repose that is upset by permitting the constitutional challenge." 18 *Wright & Miller, Federal Practice and Procedure*, § 4471, p. 716 (1981). *See also Restatement (Second) Judgements*, § 26(1)(d) (a second action should be allowed when it will better implement a constitutional scheme).

In *Allen* v. *McCurry*, 449 U.S. 90, 94 n.5, and 97 n.10 (1981), the Court expressly declined to decide whether *res judicata* would bar subsequent litigation in federal court of civil rights claims that could have been raised in a prior state court proceeding but were not. There are strong policy reasons that

support the conclusion that *res judicata* should not apply to such claims even when the relief sought includes damages. *See, e.g., Lombard* v. *Board of Education*, 502 F.2d 631, 635 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975). But there is no need for the Court to reach that question in this case, since Mr. Feldman seeks only prospective equitable relief that will not interfere with any vested rights.

Mr. Feldman's explicit reservation of his right to pursue his constitutional claims in district court makes the case for district court jurisdiction even stronger. This Court has expressly sanctioned such a reservation of rights as a method of preserving the availability of a district court forum where the federal court has abstained from deciding issues that should first be resolved by a state tribunal. *See England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). A litigant who voluntarily exhausts state administrative and judicial remedies while reserving his right to a federal forum should not be placed in a worse position than one who is ordered to do so after filing suit in district court. Federalism should encourage the voluntary submission of disputes to state authorities without requiring litigants to sacrifice the availability of a district court forum for federal claims. Otherwise, a well-advised litigant will simply file suit in district court before making any effort to resolve his disputes at the state level. No public policy would be served by that course. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims*, 60 Va.L.Rev. 250, 275 (1974); and Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 Ind.L.Rev. 543, 550-54 (1976).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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Respondent's Brief

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IN THE

Supreme Court of the United States

October Term, 1982

THE DISTRICT OF COLUMBIA COURT OF APPEALS,
et al.,

Petitioners,

-v.-

MARC FELDMAN and EDWARD J. HICKEY, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT EDWARD J. HICKEY, JR.

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QUESTION PRESENTED FOR REVIEW

Whether Respondent Hickey may bring suit in federal district court challenging the constitutionality of a rule governing bar admissions promulgated by the District of Columbia Court of Appeals, after the District of Columbia Courts of Appeals denied his request to waive the operation of the rule on his behalf in an exercise of its administrative discretion.

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Rules and Regulations

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Miscellaneous

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STATUTES AND RULES INVOLVED

The principal statute and rule involved in this case are:

D.C. Code § 11-2501(a)-

> The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.

Rule 46I(b)(3) and (4)-

> (3) Proof of Legal Education.
>
> An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school.
>
> (4) Law Study in a Law School NOT approved by the ABA.
>
> An applicant who graduated from a law school not approved by the American Bar Association may be permitted admission to an examination only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval.

STATEMENT OF THE CASE

A. Introduction

Respondent Edward J. Hickey, Jr., is a 49 year-old former Commander in the United States Navy and a 1978 graduate of the Potomac School of Law. Petitioners are the District of Columbia Court of Appeals and the individual judges thereof. In April of 1978, Respondent Hickey requested the D.C. Court of Appeals to waive on his behalf its Rule 46I(b)(3) and (4) which require graduation from a law school accredited by the American Bar Association ("ABA"), or for those who graduate from non-accredited schools, 24 additional credit hours from an ABA-accredited school in order to sit for the D.C. Bar examination. The D.C. Court of Appeals denied Mr. Hickey's request for a waiver. (J.A. 49a).

Mr. Hickey subsequently filed suit in the United States District Court for the District of Columbia, seeking a declaration that the Court of Appeals' Rule 46I(b)(3) and (4) violated the Fifth Amendment to the Constitution and the Sherman Act, and an order directing Petitioners to permit Mr. Hickey to sit for the bar examination at the earliest possible date. Petitioners moved to dismiss the Complaint for lack of subject matter jurisdiction on the ground that the filing, and subsequent denial by Petitioners, of a petition for waiver of Rule 46I on Mr. Hickey's behalf, barred the District Court from assuming jurisdiction over the suit. (J.A. 60a-66a).

By Order dated December 21, 1978, the Honorable Harold H. Greene of the District Court granted Petitioners' Motion. The District Court held that it was without jurisdiction because it believed that what Mr. Hickey sought was a review of Petitioners' denial of his application for admission to sit for the bar examination and that such review could only be obtained from the United States Supreme Court; that the exercise of jurisdiction would be a

violation of comity and judicial economy even if jurisdiction existed; and that with regard to Mr. Hickey's antitrust claim, the antitrust laws did not apply to the kind of action being challenged. (J.A. 142a-144a).

The United States Court of Appeals for the District of Columbia Circuit reversed the District Court's decision on the jurisdictional issue, holding that the waiver proceedings before the D.C. Court of Appeals were not judicial, and thus did not foreclose litigation of the constitutional issues in the District Court. *Feldman v. Gardner*, 661 F.2d 1295, 1319 (D.C. Cir. 1981). The court below accordingly reversed the District Court's dismissal of the constitutional claims and remanded them for consideration on the merits. The court below affirmed the District Court's dismissal of Mr. Hickey's antitrust claims. Petitions for rehearing and suggestions for rehearing *en banc* submitted by both parties were subsequently denied by the court below, and this Court granted certiorari on the jurisdictional issue.

B. Statement of Facts

Respondent Edward J. Hickey, Jr., began to study law after retiring from 20 years service in the United States Navy. His military career was a distinguished one. He retired with the rank of Commander, having flown 176 combat missions as a fighter pilot, and was the recipient of, among other awards, the Distinguished Flying Cross.

Mr. Hickey commenced his studies at the Potomac School of Law in March of 1975. At the time, Potomac was a new school which had not been accredited by the ABA, and whose graduates were therefore ineligible to sit for the bar examination under Rule 46I of the D.C. Court of Appeals' Rules. That rule requires that applicants for the bar examination have "graduated from a law school that at the time of graduation was approved by the American Bar

Association," or alternatively, that graduates of unapproved schools "may be permitted admission to an examination only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved" by the ABA. Rule 46I(b)(3) and (4).

Soon after Mr. Hickey enrolled at Potomac, however, another new and unaccredited school, the International School of Law, obtained a waiver of Rule 46I(b)(3) from Petitioners which permitted its graduates to sit for the July 1975 bar examination. Petitioners also granted waivers on behalf of International's 1976 and 1977 graduating classes.

In reliance upon the waivers granted to the graduates of International, Mr. Hickey fully expected that Petitioners would continue the practice of not applying Rule 46I when his class, the first graduating class of Potomac, graduated. This expectation was destroyed during Mr. Hickey's final year of law school when, on November 18, 1977, Petitioners denied, without explanation, Potomac School of Law's Petition for a Temporary Waiver of Rule 46I(b)(3). On the same day, Petitioners also refused to waive the Rule for any student of the International School of Law who graduated subsequent to August, 1977.

On April 18, 1978, a Special Petition for a Waiver of Court of Appeals' Rule 46I(b)(3) was submitted to Petitioners on behalf of Mr. Hickey. (J.A. 19a - 34a). The Petition outlined Mr. Hickey's numerous contributions to Potomac's growth as a law school, as well as his fine academic record. He served as a founding editor of the *Potomac Law Review* and participated in Potomac's Jessup Moot Court Team. Accompanying the Petition were four affidavits of prominent members of the Bar of the District of Columbia (including two judges) attesting to the competence of Mr. Hickey to sit for the examination. The Petition also pointed out that it was unfair to refuse to grant waivers to students currently enrolled at Potomac who had

pursued three years of legal education in reliance upon the former policy of Petitioners, and that a refusal to waive application of the Rule would work a particularly severe hardship on Mr. Hickey due to his age, the fact that he was unemployed, and the need to support a wife and two children.

On June 12, 1978, Petitioners denied Mr. Hickey's Petition. The basis given for the denial was that Mr. Hickey could become qualified to sit for the examination by complying with Rule 46I(b)(4) which permits an applicant who graduates from a law school not approved by the ABA to sit for the examination after receiving 24 credit hours from a law school approved by the ABA. Petitioners stated that Mr. Hickey could comply with Rule 46I(b)(4) because the ABA Standards and Rules of Procedure "permit enrollment of persons in petitioner's category under Standard 506(ii)...." (J.A. 49a).

Respondent Hickey attempted to obtain admission to each accredited law school in the District of Columbia in order to obtain the necessary 24 credit hours. Georgetown University Law Center refused to admit Mr. Hickey, stating that admission for the purpose of complying with Rule 46I(b)(4) was not possible because it would "deviate from not only the policies, but the most forceful positions of its accreditors." (J.A. 72a-73a). Howard University Law School stated that the accommodation of graduates of unapproved schools "would operate to jeopardize a school's accreditation standing." (J.A. 71a). The replies of the law schools of Catholic University, George Washington University, American University and Antioch were also all negative.

Respondent Hickey commenced his suit in the U.S. District Court for the District of Columbia on July 10, 1978. The Complaint averred that Petitioners violated his

rights under the Fifth Amendment to the Constitution and the federal antitrust laws. Specifically, the Complaint alleged that Mr. Hickey's constitutional rights were violated in that, *inter alia,* Petitioners denied him his right to due process of law by refusing to permit him to sit for the bar examination on the basis of an unconstitutional regulation: that Rule 46I(b)(3) creates an irrebuttable presumption that only graduates of ABA accredited law schools are fit to sit for the District of Columbia bar examination, thereby depriving persons such as Mr. Hickey who have pursued alternative methods of legal training of their property and liberty without due process of law; that the rule also irrationally discriminates against persons who have obtained equivalent legal training by other means and thereby also deprives them of the equal protection of the laws; and finally, that the rule is invalid on its face because it impermissibly delegates to the ABA the Petitioners' power and duty to regulate the practice of law within the District of Columbia. The Complaint further alleged that Rule 46I(b)(4) was also invalid on its face, and did not in any way diminish the detrimental impact of 46I(b)(3), because the 24 hour alternative provided a totally illusory form of relief, as no accredited law school in the District of Columbia was willing to permit graduates of unapproved schools to enroll for the necessary 24 hours. (Complaint, Paragraphs 10-11, J.A. 60a, 63a-65a).[1]

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[1]Respondent Hickey's second claim, which is not at issue before this Court, averred that the Petitioners, by requiring graduation from an ABA accredited law school as a prerequisite to sitting for the District of Columbia Bar examination, unreasonably restricted entry into the legal profession; entered into a combination in restraint of trade; and attempted to monopolize, and in fact did monopolize the practice of law in the District of Columbia, in violation of sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. (Complaint Paragraphs 13-15, J.A. 60a, 65a).

Over Petitioners' objections, discovery commenced in the District Court. Through interrogatories and requests for admissions, Mr. Hickey learned that Petitioners had never sought to determine the policy of the accredited schools in the District of Columbia toward the Rule permitting graduates of unapproved schools to sit for the examination after taking 24 credit hours at an ABA-approved school. (Responses of Defendants to Plaintiff's Request for Admissions, No. 21, J.A. 112a). Other interrogatory responses revealed the Petitioners' total dependence upon the ABA with respect to the duty imposed upon Petitioners by Congress in the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, D.C. Code §11-2501, (Interrogatories Nos. 15 and 16, J.A. 91a-92a), which requires Petitioners, *inter alia,* to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar." Respondent Hickey also sought to determine whether Petitioners had made any investigation into alternatives to ABA approval, but Petitioners refused to answer such questions on the ground that the information sought was privileged because it involved the judicial acts of Petitioners. (Interrogatories Nos. 15, 16 and 18, J.A. 91a-93a).

Of greatest significance, however, was Respondent Hickey's discovery of documents containing *ex parte* communications between agents of Petitioners and representatives of the ABA and of the American Association of Law Schools, seeking those organizations' recommendations with respect to requests for waivers of Petitioners' rules governing permission to sit for the D.C. bar examination. For instance, on March 23, 1976, Anthony Nigro, Secretary of the Committee on Admissions of the District of Columbia Bar, wrote Professor Millard H. Ruud, Executive Director of the Association of American Law Schools, stating in part:

> On February 18, 1976 International submitted the enclosed petition to the Court which is provided for your information. The Court has requested the Committee's recommendation regarding this petition.
>
> Accordingly, if you have any comments which may assist the Committee in its recommendation, please feel free to express them.

(J.A. 132a). On the same date, Mr. Nigro also wrote James P. White, Dean of Indiana University Law School, and at the time, Consultant on Legal Education to the American Bar Association. In that letter, Mr. White was also asked for his comments with respect to International School of Law's Petition. (J.A. 135a).

On April 26, 1978, Alexander L. Stevas, Clerk of the District of Columbia Court of Appeals wrote Frederick R. Franklin, Staff Director of the ABA's Section of Legal Education and Admissions to the Bar with respect to Mr. Hickey's Petition. Mr. Stevas stated:

> The Court has instructed me to make formal inquiry of you respecting an allegation made by a petitioner who is seeking to be admitted to the Bar of this Court as a graduate from a non-ABA approved law school. The petitioner, who attended Potomac School of Law (non-ABA approved), has indicated that "...The ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to non-degree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement."

* * *

> Can you please inform me whether or not the American Bar Association has issued such instructions? Your response for the use of the Court in acting upon the pending petition will be appreciated.

(J.A. 138a).

C. The Decisions Below

In spite of the implications of these *ex parte* communications, Petitioners filed a Motion to Dismiss on October 31, 1978, contending, *inter alia,* that the District Court lacked jurisdiction on the ground that the determination of the D.C. Court of Appeals constituted a "judicial act" which could not be reviewed in the District Court. On December 21, 1978, the District Court entered a Memorandum Order granting Petitioners' Motion to Dismiss. (J.A. 142a). The District Court summarily rejected Respondent Hickey's contention that his Complaint was a constitutional attack on the Court of Appeals' rulemaking authority or the administration of the rules. Without any reference to the actual language of Hickey's Complaint, the District Court stated:

> [h]owever the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of defendants' denial of his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with [Mr. Hickey's] efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case.

(J.A. 143a).

The D.C. Circuit reversed, holding that the District Court had jurisdiction over Respondent Hickey's

constitutional claims because the D.C. Court of Appeals' denial of Hickey's request for a waiver of Rule 46I(b)(3) and (4) was a nonjudicial act. The court below reached its decision only after scrutinizing the nature and effect of the action taken by the D.C. Court of Appeals, and analyzing the case law of this Court and the federal courts of appeals. The court emphasized that "only orders which declare or enforce rights and liabilities rise to the level of judicial action." *Feldman v. Gardner*, 661 F.2d at 1313. The critical inquiry for the court below was whether Mr. Hickey asserted "a claim of a present right to admission to the bar." *Id.* at 1315. The court below found that Mr. Hickey did not request the Court of Appeals to invalidate any rule, nor did he ask for anything as a matter of right. Mr. Hickey merely asked the Court of Appeals to consider his circumstances and except him from the operation of Rule 46I(b)(3). *Id.* at 1320. The court below concluded that the Court of Appeals' denial of Mr. Hickey's request constituted a ministerial act, and thus, federal district court jurisdiction of Mr. Hickey's constitutional claims was not foreclosed:

> In sum, our analysis of these cases in light of the relevant precedent constrains us to hold that in each instance the prior proceedings before the [District of Columbia] Court of Appeals were of a nonjudicial character, and therefore did not produce in either a judgment reviewable by the Supreme Court. It follows that appellants' suits in the District Court were jurisdictionally appropriate for consideration and disposition of their constitutional claims.

Id. at 1319 (footnotes omitted).

The court below accordingly reversed the District Court's dismissal of the constitutional claims and remanded them for consideration on the merits. Petitions for rehearing and suggestions for rehearing *en banc* were subsequently denied by the court below, and this Court granted certiorari on the jurisdictional issue.

SUMMARY OF THE ARGUMENT

The decision of the D.C. Circuit was clearly correct and should be affirmed. Respondent Hickey alleged in his Complaint in the District Court that Rule 46I(b)(3) and (4) of the D.C. Court of Appeals violates his rights under the Fifth Amendment to the Constitution. Simply because D.C. Court of Appeals Rule 46I(b)(3) and (4) pertains to bar admissions and has been promulgated and is enforced by judges does not alter the conclusion that federal district court jurisdiction of Mr. Hickey's constitutional claims is appropriate. This Court and the federal courts of appeals have repeatedly held that bar-related actions taken by the state courts are subject to constitutional challenge in the federal district courts. Indeed, this Court has recently upheld federal district court jurisdiction over constitutional claims asserted against the Supreme Court of Virginia in its capacity as enforcer of Virginia's bar disciplinary rules. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 736 (1980).

1. The fact that the D.C. Court of Appeals denied Respondent Hickey's request for an individual waiver of Rule 46I(b)(3) does not alter this result. That denial was a nonjudicial, administrative act. Therefore, the District Court had jurisdiction over Respondent Hickey's constitutional claims.

In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), this Court stated that whether or not a state court proceeding is judicial, and thus, only subject to review in this Court, depends on the nature of the proceeding and the relief sought; a court acts in a judicial capacity only when it investigates, declares, and enforces liabilities. Focusing on this test, the court below found that Respondent Hickey did not solicit the D.C. Court of Appeals to resolve a case or controversy requiring resort to legal principles: he did not assert any sort of right to be admitted to the D.C. Bar, but

instead merely asked the court to consider his individual circumstances and except him from the operation of Rule 46I(b)(3). *See In Re Summers,* 325 U.S. 561, 567-69 (1945). Thus, the D.C. Court of Appeals' denial of Mr. Hickey's request could not have constituted a judicial act, and therefore, is not subject to review in this Court.

In deciding cases with facts strikingly similar to those presented here, the Fifth and Seventh Circuits have reached the same result as the court below. In *Ktsanes v. Underwood,* 552 F.2d 740 (7th Cir. 1977), *cert. denied,* 435 U.S. 933 (1978), Ktsanes petitioned the Illinois Supreme Court for a waiver of the court's rule denying reciprocity admission to the Illinois bar for persons who had failed the Illinois bar examination, and the Illinois Supreme Court denied Ktsanes' request. The Seventh Circuit held that because Ktsanes had not asserted a present right to admission to the bar, but merely requested an exemption from the bar rule, the Illinois Supreme Court's denial of Ktsanes' request was a ministerial, rather than judicial act, and thus, federal district court jurisdiction of Ktsanes' constitutional claims was appropriate. *See Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981) (Fifth Circuit upheld federal court jurisdiction over constitutional claims arising out of Supreme Court of Texas' denial of petition of graduate of non-ABA approved school to sit for Texas bar examination).

Furthermore, federal district court jurisdiction over Respondent Hickey's claims is appropriate because Mr. Hickey is challenging the constitutionality of the general rules and regulations governing admission to the D.C. bar; he is not seeking review of a particularized decision of the Court of Appeals adjudicating his right to practice law. *See Brown v. Board of Bar Examiners,* 623 F.2d 605 (9th Cir. 1980). Mr. Hickey neither raised nor litigated his constitutional claims before the D.C. Court of Appeals, and

therefore, federal district court jurisdiction of the constitutional claims is not foreclosed. *See Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981); *Getty v. Reed,* 547 F.2d 971 (6th Cir. 1977).

2. District Court jurisdiction of Respondent Hickey's claims is entirely consistent with principles of comity and the District of Columbia Court Reform Act. Although bar-related issues may be considered matters of local concern, this Court has emphasized that even in cases involving purely local matters, the federal district courts must not abdicate the jurisdiction vested in them. *Wilcox v. Consolidated Gas Co.,* 212 U.S. 19, 39-40 (1908); *see also Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719, 736 (1980). This is especially true in cases in which constitutional challenges are asserted against the actions of the state courts themselves. *Rose v. Mitchell,* 443 U.S. 545, 561 (1979). Indeed, as the primary protectors of constitutional rights, the federal courts in the various states have not hesitated to consider constitutional challenges to state bar rules.

Moreover, contrary to Petitioners' assertions, the D.C. Court Reform Act does not immunize D.C. Court of Appeals Rule 46l(b)(3) and (4) from constitutional scrutiny in the District Court. The Court Reform Act merely places the District of Columbia judiciary on the same footing as the state court systems. Nothing in the Act strips the District Court of its power to examine the actions of local officials that are challenged under federal law. Thus, federal court jurisdiction of Respondent Hickey's constitutional claims is entirely appropriate.

ARGUMENT

A. The Holding that the District of Columbia Court of Appeals' Actions were Nonjudicial in Character and Therefore Subject to Challenge in Federal District Court is Consistent with the Decisions of this Court.

The D.C. Circuit correctly held that the D.C. Court of Appeals' denial of Respondent Hickey's request for an individual waiver of Rule 46I(b)(3) was a nonjudicial, administrative act. Thus, the D.C. Circuit concluded, the District Court for the District of Columbia had jurisdiction over Respondent Hickey's constitutional claims. The decision of the court below is consistent with the decisions of this Court, and those of all the circuits that have examined the issue. Nevertheless, Petitioners, in their Brief on the Merits to this Court (Brief), advance the simplistic argument that all court actions pertaining to bar matters are judicial in nature and therefore, the constitutional issues arising out of such actions are immune from challenge in the federal courts.

In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), this Court held that not every action taken by a court is judicial in character, and that when courts engage in legislative or administrative functions, they do not adjudicate a case or controversy capable of appellate review. In determining whether or not a court proceeding is judicial, this Court has emphasized the nature of the proceeding and the relief sought: a court acts in a judicial capacity only when it "investigates, declares, and enforces liabilities as they stand on present or past facts...." *Id.* at 226-27; *see In Re Summers*, 325 U.S. 561, 567 (1945). The court below correctly held that the D.C. Court of Appeals did not investigate, declare, and enforce legal liabilities, but only acted in an administrative capacity when it denied Mr. Hickey's request for a waiver of the bar rules. In urging this

Court to reverse the decision of the court below, Petitioners fail to focus on the nature of the proceeding and the relief sought in the Court of Appeals, and instead focus exclusively on the subject matter of the court proceeding — bar admissions. Petitioners argue that all court actions pertaining to bar matters are judicial in character, and as such, can only be reviewed in this Court. (Brief at 20). This Court, however, has recently upheld federal district court jurisdiction over constitutional claims asserted against the Supreme Court of Virginia in its capacity as enforcer of Virginia's bar disciplinary rules. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 736 (1980).

Petitioners principally rely upon *In Re Summers*, 325 U.S. 561 (1945)[2] and *Ex parte Garland*, 71 U.S. 333 (1867) to support their argument that the D.C. Court of Appeals' denial of Mr. Hickey's request for a waiver was a judicial, rather than administrative, act. (Brief at 20). Both cases involved state court actions pertaining to bar admissions, and this Court held in both cases that the actions were judicial in nature. 325 U.S. at 568-69; 71 U.S. at 378-79. Contrary to Petitioners' assertions however, neither *Summers* nor *Garland* mandates a conclusion different from the one reached by the court below. Petitioners have simply read these cases too broadly, basing upon them the argument that as long as a court proceeding involves a bar admissions issue, it is judicial in nature. Petitioners ignore *Prentis v. Atlantic Coast Line Co.*, 211 U.S. at 226-27, which establishes what whether or not a court proceeding is judicial depends on the nature of the proceedings and the

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[2]As noted by the court below, *In Re Summers*, 325 U.S. 561 (1945), is the only case in which this Court has addressed the "mutual exclusivity of its direct review authority and district-court jurisdiction" in the bar admission context. 661 F.2d at 1313.

relief sought, not on the fact that the tribunal happens to be a court.

Petitioners' reliance on *Ex parte Garland,* 71 U.S. 333 (1867), for the broad proposition that all bar-related proceedings in state courts are judicial in nature (Brief at 12, 20, 21), is misplaced. As the court below correctly noted, although this Court in *Garland* described the admission of attorneys to the bar as an exercise of judicial power, it was not called upon, as was the court below, to determine the proper forum for examination of federal constitutional issues raised in bar-related matters.[3]

Similarly, *In Re Summers,* 325 U.S. 561 (1945), is also inapposite. Summers, an applicant for admission to the Illinois bar, asked the Illinois Supreme Court to overturn a decision of the court's character committee, arguing that the decision violated his First and Fourteenth Amendment rights. The Illinois Supreme Court declined, and Summers petitioned this Court for a writ of certiorari. In granting the writ, this Court applied the *Prentis* test, analyzing the nature and effect of the state court proceeding. 325 U.S. at 567. Declaring that "[a] claim of present right to admission to the bar of a state and a denial of that right is a controversy," and that when "the claim is made in state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article 3 of the Constitution," this Court found that the proceeding before the Illinois Supreme Court was a judicial one, because it sought relief expressly against the asserted unconstitutional

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[3]The petitioner in *Garland* was a former Confederate officer who, in seeking admission to this Court's bar, challenged a statute which required all persons seeking permission to practice before this Court to affirm that they had never voluntarily borne arms against the United States. This Court declared the statute unconstitutional on the ground that it was the responsibility of the judiciary, not Congress, to determine who was to be admitted to the bar.

action of the character committee. *Id.* at 567-69. Because the Illinois Supreme Court proceeding was judicial, it was properly reviewable in this Court. *Id.*

Despite Petitioners' arguments to the contrary, the decision of the court below is not inconsistent with *Summers.* In examining the nature of the proceeding and the relief sought in the Court of Appeals, the crucial inquiry for the court below was whether Mr. Hickey had asserted "[a] claim of present right to admission to the bar." *See In Re Summers,* 325 U.S. at 568. Absent such a claim, the proceedings in the Court of Appeals clearly could not have been judicial. *Id.* The court below found that unlike Summers, Mr. Hickey did not solicit the court to resolve a case or controversy requiring resort to legal principles: he did not assert any sort of right to be admitted to the D.C. bar, but instead merely asked the court to consider his individual circumstances and except him from the operation of the rules on bar admission. Mr. Hickey did not contest the constitutionality of Rule 46I(b)(3) and (4) before the D.C. Court of Appeals; he was asking for ministerial discretion, not a judicial determination. *See Ktsanes v. Underwood,* 552 F.2d 740 (7th Cir. 1977), *cert. denied,* 435 U.S. 933 (1978). Mr. Hickey's request can hardly be viewed as a claim of present right to admission to the bar. As the court below correctly held, the D.C. Court of Appeals' denial of Mr. Hickey's request for a waiver constituted an exercise of administrative discretion, not a judicial act; thus, the constitutional issues raised by the action of that court are not immune from challenge in the District Court.

Indeed, as the D.C. Circuit noted, "the suggestion that the Court of Appeals' orders were products of judicial proceedings seems strange." 661 F.2d at 1314. This Court has established that in determining whether a proceeding is judicial, "we must for ourselves appraise the circumstances

of the refusal." *In Re Summers*, 325 U.S. at 566 (citations omitted); *see Brooks* v. *Laws*, 208 F.2d 18, 27 (D.C. Cir. 1953). The procedures followed by the Petitioners were rather unorthodox for what they now argue was a judicial proceeding: no docket entry was made; there was no opportunity for submission of evidence by Mr. Hickey; Mr. Hickey had no opportunity for a hearing; there were no opposing parties in the classic sense; the D.C. Court of Appeals engaged in several *ex parte* communications.[4] These factors clearly militate against a finding that the proceeding before the D.C. Court of Appeals was judicial in nature.

Careful analysis demonstrates that not only do *Summers* and *Garland* not support Petitioners' position, but that there is not a single lower court case upon which Petitioners can rely.[5] In *Ktsanes v. Underwood*, 552 F. 2d 740 (7th Cir.

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[4]Such *ex parte* communications arguably may be appropriate in a rule-making situation, but are totally inappropriate in an adjudicatory situation. *Compare Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *with Van Curler Broadcasting Corp. v. United States*, 236 F.2d 727, 730 (D.C. Cir. 1956). Even in an administrative agency situation, *ex parte* communications have been considered as evidence of the nonjudicial nature of the agency's conduct. *See D.C. Federation of Civil Associations v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

[5]There are scores of other cases in which federal district courts have entertained challenges to state bar admission requirements, often after the state had denied admission to the applicant. *See, e.g., Getty v. Reed*, 547 F.2d 971 (6th Cir. 1977); *Taylor v. Kentucky State Bar Ass'n*, 424 F.2d 478 (6th Cir. 1970); *Goldsmith v. Pringle*, 399 F. Supp. 620 (D. Colo. 1975); *Huffman v. Montana Supreme Court*, 372 F. Supp. 1175 (D. Mont.), *aff'd mem.*, 419 U.S. 955 (1974); *Shenfield v. Prather*, 387 F. Supp. 676 (N.D. Miss. 1974); *Brown v. Supreme Court of Va.*, 359 F. Supp. 549 (E.D. Va. 1971); *Harris v. Louisiana State Supreme Court*, 334 F. Supp. 1289 (E.D. La. 1971); *Potts v. Honorable Justices of Supreme Court of Hawaii*, 332 F. Supp. 1392 (D. Hawaii 1971) *(per curiam); Keenan v. Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970).

1977), *cert. denied*, 435 U.S. 933 (1978), the Seventh Circuit held that the Illinois Supreme Court's decision to deny a petition for an exemption from a bar rule denying reciprocity admission to the Illinois bar for persons who had failed the Illinois bar examination was not a "judicial" act reviewable only in this Court. The Seventh Circuit distinguished *Summers*, holding that when Ktsanes petitioned the Illinois Supreme Court he merely requested an exemption from the rule, he did not challenge it, as did Summers. The Court emphasized that there was " 'no claim of a present right to admission to the bar of a state and a denial of that right' which the *Summers* Court held to create a case or controversy under Article III." 552 F.2d at 743 (quoting *In Re Summers*, 325 U.S. at 568). The court concluded that Ktsanes:

> was asking for ministerial action, not a judicial determination. The denial of his petition was made by the court acting in an administrative capacity. That denial did not present a case or controversy cognizable by an Article III court, and, thus, was not appealable to the Supreme Court of the United States.

552 F.2d at 743 (citations omitted).[6]

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[6]Petitioners argue that the decision in *Ktsanes v. Underwood* is "problematic" because it reached an "opposite result" from the decision of the same court in *Grossgold v. Supreme Court of Ill.*, 557 F.2d 122 (7th Cir. 1977). (Brief at 22-23 n.8). Contrary to Petitioners' assertions however, the court in *Grossgold* emphasized that its decision in *Ktsanes* "is not contrary [to the decision in *Grossgold*]," because Ktsanes "was asking for ministerial action" by the Illinois Supreme Court and it was refused "by the court acting in an administrative capacity." 557 F.2d at 125. In *Grossgold*, on the other hand, the Illinois Supreme Court, acting in a judicial capacity, passed upon Grossgold's constitutional claims which had been fully developed in adversary proceedings before the court. Hence, district court review was appropriate in *Ktsanes*, and inappropriate in *Grossgold;* thus, as the Seventh Circuit itself made clear, and contrary to Petitioners' erroneous suggestion, there is nothing inconsistent in the Seventh Circuit's decisions in *Ktsanes* and *Grossgold*.

Petitioners cite several cases in which federal district court review of particularized bar admissions decisions of state courts was held to be inappropriate.[7] These decisions are inapposite, however, as Mr. Hickey is challenging the constitutionality of the general rules and regulations governing admission to the District of Columbia Bar; he is not challenging a particularized decision of the Court of Appeals adjudicating his right to practice law. Indeed, it is well settled that federal district court jurisdiction is appropriate when the disappointed bar applicant attacks the state's general bar admission scheme. *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977).[8]

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[7] *E.g., Whitwell v. Board of Law Examiners*, 652 F.2d 60 (6th Cir.), *cert. denied*, _____ U.S. _____ , 102 S.Ct. 131 (1981); *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Woodward v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979); *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977).

[8] *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980), outlined the alternatives available to an unsuccessful bar applicant:

> Since federal courts are granted jurisdiction under 28 U.S.C. §1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977).
>
> In the first type of attack, federal district courts may assert jurisdiction under §1343 to ensure that generally applicable rules or procedures do not impinge on constitutionally protected rights . . . .
>
> On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court . . . .

623 F.2d at 609-10 (citations omitted).

Petitioners' reliance on cases dealing with attorney disciplinary and disbarment proceedings[9] is similarly unwarranted because, as the D.C. Circuit noted, these cases "culminated in adjudications on the right to engage in law practice." 661 F.2d at 1319 n.200. Respondent Hickey does not dispute that such proceedings, involving as they do a claim of present right to engage in the practice of law, are judicial in nature and hence reviewable only in this Court. *See In Re Summers*, 325 U.S. 561 (1945). Such cases, however, are clearly inapposite here, as Respondent Hickey merely requested an exercise of administrative grace, not an adjudication of his right to engage in the practice of law.

Even in cases in which the prior state proceeding was judicial in character, but did not involve the adjudication of constitutional claims, those claims could properly be brought in federal court. The D.C. Court of Appeals simply denied Respondent Hickey's request for a waiver of Rule 46I(b)(3), it neither considered nor decided the merits of his constitutional challenge to the Rule itself, as the constitutional claims were raised for the first time in the District Court. *Dasher v. Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), also involved a graduate of a law school that was not ABA approved. After the Supreme Court of Texas denied Ms. Dasher's petition to admit her to the Texas bar examination, Ms. Dasher filed suit in federal court, raising for the first time her constitutional claims. The Fifth Circuit noted that "since 28 U.S.C. §1257(3) authorizes the Supreme Court to review only judgments in state court cases in which a federal issue was raised and

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[9]*E.g., Martinez Rivera v. Trias Monge*, 587 F.2d 539 (1st Cir. 1978); *Grossgold v. Supreme Court of Ill.*, 557 F.2d 122 (7th Cir. 1977); *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); *Jones v. Hulse*, 391 F.2d 198 (8th Cir.), *cert. denied*, 393 U.S. 889 (1968); *Ginger v. Circuit Court*, 372 F.2d 621 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967); *Gately v. Sutton*, 310 F.2d 107 (10th Cir. 1962).

adjudicated," Ms. Dasher's case could not have been reviewed on a writ of certiorari from this Court following the Texas Supreme Court's denial of her motion. *Id.* at 1051. The court held that because Ms. Dasher's federal court complaint raised constitutional claims not presented to the Texas Supreme Court, her federal court suit did not "constitute an impermissible effort to seek review of a state court judgment in a lower federal court." *Id.*[10] Similarly, in his Complaint filed in the District Court, Respondent Hickey claimed for the first time that Rule 461 is constitutionally invalid on its face and in its application. Like Ms. Dasher's constitutional claims, Respondent Hickey's claim was neither raised nor litigated before the D.C. Court of Appeals. *Compare Howell v. State Bar of Texas,* 674 F.2d 1027 (5th Cir. 1982) (Fifth Circuit upheld federal district court jurisdiction because plaintiff's constitutional claims were not raised in state supreme court) *with Grossgold v. Supreme Court of Illinois,* 557 F.2d 122 (7th Cir. 1977) (federal district court jurisdiction barred because constitutional claims were fully developed and litigated in state supreme court proceeding).

In *Getty v. Reed,* 547 F.2d 971 (6th Cir. 1977), the Sixth Circuit held that, even after litigating the merits of their suspensions and disbarments in the state courts, plaintiffs

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[10]Petitioners attempt to distinguish *Dasher v. Supreme Court of Tex.*, 658 F.2d 1045 (5th Cir. 1981), by stating that in *Howell v. State Bar of Tex.*, 674 F.2d 1027 (5th Cir. 1982), the Fifth Circuit indicated that federal district court jurisdiction was appropriate in *Dasher* "only because the plantiff could not have sought direct review from the state court decision in this Court." (Brief at 22-23 n.8). Petitioners' "distinction," however, actually reinforces Respondents' position: in both *Dasher* and *Howell,* plaintiffs, like Respondent Hickey, did not raise their federal constitutional claims before the Texas Supreme Court, and thus, review of those claims was not available in this Court. Consequently, as recognized by the court below in connection with Mr. Hickey's claims, the federal district court had jurisdiction over plaintiffs' federal claims.

were not precluded from subsequently bringing an action in federal district court challenging the constitutionality of the state rules pursuant to which they had been censured. Therefore, even assuming that Petitioners' denial of Mr. Hickey's request for a waiver was a judicial act, Mr. Hickey's constitutional challenge in the District Court to the validity of Rule 46I(b)(3) and (4) must be upheld, as Hickey's constitutional claims were neither raised nor adjudicated in the Court of Appeals.

In its decision in *Feldman v. Gardner*, (J.A. 79a), the District Court stated that if the D.C. Court of Appeals' order denying Mr. Feldman's petition for a waiver had simply "reflect[ed] an administrative act by the D.C. Court of Appeals denying him an exemption from the rule . . . then [Mr. Feldman] would be on fairly strong jurisdictional footing." (J.A. 81a). The court concluded however, that dismissal was proper in *Feldman* because Mr. Feldman did more than seek a Rule 46 waiver, he raised his constitutional claims before the D.C. Court of Appeals. (J.A. 82a). Thus, *Feldman*, like *Dasher* and *Getty*, establishes that jurisdiction did exist in the District Court over Mr. Hickey's constitutional claims.[11]

Clearly, federal district court jurisdiction over Respondent Hickey's constitutional claims is entirely appropriate. First, the Court of Appeal's denial of Mr. Hickey's request for a waiver constituted an administrative exercise of discretion, not a judicial act. Second, Mr.

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[11]It should be pointed out, however, that Respondent Hickey does not agree that the District Court's dismissal of Feldman's claim was proper. As Respondent Feldman has detailed in his Brief to this Court, it seems beyond dispute that the mere outlining in a short letter of various constitutional and antitrust violations that conceivably could flow from failure to permit an applicant to take the bar exam, without the submission of briefs or argument, does not constitute prior litigation of these matters.

Hickey has challenged the constitutionality of the D.C. Court of Appeals rules on bar admission; he is not seeking review of a particularized decision of the Court of Appeals adjudicating his right to practice law. Finally, Mr. Hickey's constitutional claims were neither raised nor adjudicated before the Court of Appeals, and thus, they may properly be raised in the District Court.

B. District Court Jurisdiction of Respondent Hickey's Constitutional Claims is Consistent with Principles of Comity and the District of Columbia Court Reform Act.

Congress has made the federal district courts the "*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and the treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original). The D.C. Court of Appeals' desire to exercise exclusive jurisdiction over all claims arising out of bar-related matters reinforces the need for federal court jurisdiction over claims that the court has acted unconstitutionally. Indeed, this Court has recently emphasized that:

> claims that the state judiciary itself has purposely violated the Equal Protection Clause are different [from claims that the state police have acted unconstitutionally]. There is a need in such cases to ensure that an independent means of obtaining review by a federal court is available on a broader basis than review only by this Court will permit. A federal forum must be available if a full and fair hearing of such claims is to be had.

Rose v. Mitchell, 443 U.S. 545, 561 (1979). Clearly, the D.C. Court of Appeals has a vital interest in upholding the validity of its own bar rules. Precisely for that reason, federal court jurisdiction over challenges to those rules must not be foreclosed.

It is obvious from the authorities cited in Section A, above, that federal courts have not hesitated to examine the constitutional aspects of certain state court actions relating to bar matters. For example, in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd*, 401 U.S. 154 (1971), Judge Friendly, writing for a three-judge court, pointedly rejected the contention that the state court's adoption of rules governing bar admissions was immune from challenge in a federal district court:

> We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are. Rather it would seem anomalous that while federal courts could entertain a complaint similar to the plaintiffs' if made with respect to other licensed professions, such as medicine or accountancy, they are powerless with respect to admission to the bar.
>
> * * *
>
> Their contention is rather that admission to the bar is so peculiarly a matter of state concern that its resolution should be left to the state courts, subject, of course, to review by the Supreme Court. But that Court has given short shrift to similar claims in matters, equally of state concern, such as education, *McNesse v. Board of Education*, 373 U.S. 668 (1963), and state employees, *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

299 F. Supp. at 123-24. Indeed, in denying Respondent Hickey's request for a preliminary injunction to permit him to sit for the bar examination, the District Court emphasized that:

> [w]hile principles of federal-state relationships, abstention and comity must be given full deference, it does not follow that if there is federal jurisdiction, and if defendants and others under their control are violating plaintiff's constitutional or other federal rights, [this] Court should not or would not act.

Hickey v. District of Columbia Court of Appeals, 457 F. Supp. 584, 586 (D.D.C. 1978).

Nevertheless, Petitioners argue that principles of comity dictate that the U.S. District Court for the District of Columbia must refuse to exercise its jurisdiction over the federal constitutional issues arising out of the D.C. Court of Appeals' denial of Mr. Hickey's request for a waiver of Rule 46I(b)(3). (Brief at 25-29). This Court, however, has never held that the federal district courts should hesitate to exercise their jurisdiction over federal constitutional issues simply because a state court contends that it should enjoy exclusive jurisdiction over "matters of purely local concern." (Brief at 27). Indeed, this Court emphasized in *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 39-40 (1908), that federal courts have a duty to exercise the jurisdiction reposed in them, regardless of the fact that the case may be one of purely local concern. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), this Court stressed the "virtually unflagging obligation of the federal courts to exercise the jurisdiction

given them," and stated that the only exceptions to this established principle are "extraordinary and narrow." *Id.* at 813.[12]

Petitioners argue that Congress preempted District Court jurisdiction over Respondent Hickey's constitutional claims when it passed the D.C. Court Reform and Criminal Procedure Act, 84 Stat. 473 (1970), because the Act provides that the D.C. Court of Appeals shall "make such rules as it deems proper respecting the examination, qualification, and admission to the D.C. Bar." D.C. Code §11-2501 (1981). (Brief at 17-25). This provision simply transferred responsibility for the promulgation of bar rules from the federal district court to the D.C. Court of Appeals. Contrary to Petitioners' assertions, there is nothing in the Court Reform Act or its legislative history that compels or even suggests that principles of comity immunize D.C. bar matters from constitutional scrutiny in the District Court. Indeed, as pointed out above, principles of comity have not constrained the federal courts in the various states from exercising their jurisdiction over federal issues raised in the bar admissions context. Although Petitioners suggest that there is something "special" in the relationship between the U.S. District Court for the District of Columbia and the D.C. Court of Appeals (Brief at 29), Congress, in passing the Court Reform Act, stated that: "[t]he jurisdictional changes will result in a Federal-State Court system in the

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[12]Abstention is appropriate where difficult questions of state law are presented that would initially be better resolved by the local courts, *see Colorado River Water Conservation v. United States*, 424 U.S. 800, 813 (1976), or when the federal court's jurisdiction would interfere with an already pending criminal or civil case involving important state interests, *see Younger v. Harris*, 401 U.S. 37 (1971) (pending criminal case); *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, _____ U.S. _____, 102 S. Ct. 2515 (1982) (pending disbarment proceeding). Clearly, none of these situations is present here.

District of Columbia analogous to court systems in the various states." H.R. Rep. No. 907, 91st Cong., 2d Sess. 34-35 (1970). Hence, as the federal district courts in the various states have exercised their jurisdiction over the federal issues arising out of bar-related matters, so too, the U.S. District Court for the District of Columbia must exercise its jurisdiction over Respondent Hickey's constitutional claims.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals should be affirmed insofar as it held that the District Court had jurisdiction over Respondent Hickey's constitutional claims, and the case should be remanded to the District Court for consideration on the merits.

Respectfully submitted,

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Petitioner's Reply Brief

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—v.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. Introduction: The Overriding Issues

Respondents have filed separate briefs in this case. Combined, the two briefs offer some 75 pages of putative rationale and explanation for a decision of the U.S. Court of Appeals for the D.C. Circuit which itself ran over 50 pages and included more than 200 footnotes. The labyrinthine complexity of these documents should not obscure the central, and essentially straightforward, issues which caused petitioners—the D.C. Court of Appeals and its Judges—to seek certiorari in this Court, and which also impelled the Conference of Chief Justices of the 50 states to file as Amicus Curiae in support of the D.C. Court of Appeals.

Accordingly, it may be useful to put the matter in immediate perspective by addressing respondents' claims as to the overriding issues at stake here. As we indicated in our opening brief, the opinion of the U.S. Court of Appeals under review held that decisions of the D.C. Court of Appeals respecting admission to the D.C. Bar in individual cases—here the cases of respondents Feldman and Hickey—are reviewable by the U.S. District Court for the District of Columbia. This review is available, the U.S. Court of Appeals held, because such decisions are merely ministerial or administrative in character, and are not judicial.

In their efforts to support this holding, respondents now make several remarkable claims:

First, although Mr. Hickey is not so bold, Mr. Feldman claims that the decision of the U.S. Court of Appeals "reflects scrupulous concern for the independence of the D.C. Court of Appeals." (Feldman Brief at 18.) That simply is not so. Whatever the rhetoric of the U.S. Court of Appeals panel opinion, its result is to subordinate the Congressionally mandated jurisdiction of the D.C. Court of Appeals over its own Bar to the supervision of the federal District Court in the District of Columbia and ultimately to that of the U.S. Court of Appeals for the D.C. Circuit. If the decision below actually reflected the "scrupulous concern" asserted by Mr. Feldman, the D.C. Court of Appeals would not have petitioned for review in this Court and the Conference of Chief Justices would not have supported the petition.

Second, respondents both claim that the U.S. Court of Appeals' decision obviates the possibility of "a trap for unwary plaintiffs" in which a bar applicant would have "no opportunity for a hearing" on his claim for admission. (Feldman Brief at 12; Hickey Brief at 17, 21-22.) But there was no such trap here. Neither Mr. Feldman nor Mr. Hickey was denied the opportunity to present, as fully as he desired, his case for bar admission to the D.C. Court of Appeals. Nor was either respondent denied the opportunity to seek review in this

Court, which each chose to forego. What is really being sought is not the opportunity to present arguments and evidence in support of bar admission, but the opportunity to bifurcate and present the case for admission twice: first to the local court and, if the applicant is dissatisfied with the result, then to a lower federal court in a suit to overturn the local court's decision. That is what respondents here attempted to do.

Third, respondents claim that the U.S. Court of Appeals' decision "is entirely consistent with principles of comity" and that a rejection of respondents' position "would increase friction between state and federal courts." (Hickey Brief at 12; Feldman Brief at 21.) But, again, the opposite is true. As the Conference of Chief Justices has noted in its brief, "*de novo* review by federal district courts of state bar admissions and similar decisions would cause serious disruption of the state court system." (Brief of Amicus Curiae at 4.) The decision here under review does not promote comity and federalism but, to the contrary, authorizes a jurisdiction that will set federal and local court systems on a collision course.

As we explain below, respondents' other contentions are no more persuasive than their arguments respecting the central issues presented by the case.

II. Respondents' Rationales for Federal Jurisdiction Cannot Be Squared with the Facts or the Law

A. *The "General Challenge" Doctrine*

Both respondents rely heavily on certain lower court decisions which hold that, although federal District Courts lack jurisdiction over challenges to prior adverse state court decisons in individual bar admission cases, they nonetheless may entertain challenges to a state's general rules respecting bar admission. As stated by the U.S. Court of Appeals for the Tenth Circuit:

> "There is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court. The first is a constitutional

> challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds that the state has unlawfully denied a particular applicant admission . . . while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules [citations omitted] such is not true where review of a state court's adjudication of a particular application is sought." *Doe* v. *Pringle*, 550 F.2d 596, 597 (10th Cir. 1976).[1] (*See* Brief for Petitioners at 23 n.9.)

To fit their cases within this doctrine, both respondents now claim to have challenged only the D.C. Court of Appeals' "general rules and regulations governing admission." (Hickey Brief at 11; *see* Feldman Brief at 41.) But neither respondent has apprised this Court of the allegations actually contained in his federal court complaint. Significantly, even though respondents' briefs contain numerous characterizations of the District Court proceedings, there is not one quotation anywhere in either brief from the complaints that respondents filed in the District Court. The fact is that the gravamen of each complaint was that the D.C. Court of Appeals had acted arbitrarily and capriciously in applying the requirement of graduation from an ABA accredited law school[2] in the individ-

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1 Mr. Feldman quotes part of this paragraph at page 26 of his brief, but he omits the reference to cases "where review of a state court's adjudication of a particular application is sought."

2 As we noted in our opening brief, the lawfulness of this requirement as a general matter has been upheld so many times, including in this Court's decision in *Application of Hansen*, 275 N.W.2d 790 (Minn. 1978), *appeal dismissed for want of a substantial federal question*, 441 U.S. 938 (1979), that it is hardly a subject for further litigation. *See* cases cited at 4 n.2 of Brief for Petitioners. Under familiar jurisdictional principles, a facial attack on the requirement would present an insubstantial issue and would not be within the cognizance of the District Court. *Hagans* v. *Levine*, 415 U.S. 528, 537-39 (1974); *see also Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

ual—and allegedly unique—circumstances of the particular respondent's case. Thus, the constitutional theory of both the Feldman and Hickey complaints was predicated upon the following allegation:

> "By refusing to consider whether plaintiff's individual qualifications and training were equivalent to graduation from an ABA accredited law school and for that reason justified a waiver of Rule 46 I, the defendant Court of Appeals acted arbitrarily and capriciously and, accordingly, deprived plaintiff of his liberty and property without due process of law." (J.A. 42a; J.A. 64a-65a.)[3]

That respondents sought to challenge the D.C. Court of Appeals' decisions in their individual cases was confirmed by their discovery efforts in the District Court, which we discuss below. It is underscored by the fact that, even in this Court, they have not been able to agree upon a joint brief. Instead, they have continued to present their cases individually, each still wishing to stress the unique characteristics of his claim for admission to the D.C. Bar and the alleged unfairness of the D.C. Court of Appeals' decision in his case.

In Mr. Feldman's case, the individual grievance turns essentially upon his insistence on his right to prove that his personal qualifications are equal to those of a graduate of an ABA-approved law school. In Mr. Hickey's case, the grievance is equally individualized in character. It relates to the decision of the D.C. Court of Appeals in November 1977 not to grant a waiver of Rule 46I(b)(3) for graduates of Mr. Hickey's law school, Potomac, as well as to Mr. Hickey's personal frustration at his inability to gain admission to an approved law school in the District so as to satisfy the alternative condition of 24 credit hours at an ABA-approved school.

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3 Although the factual claims were very different, the legal allegations of the two complaints paralleled each other on an almost word-for-word basis. Compare J.A. 42a-44a and J.A. 64a-66a.

Both District Court Judges recognized that the substance of respondents' claims brought their cases squarely within the rule against lower federal court jurisdiction over claims "based on constitutional or other grounds that the state has unlawfully denied a particular applicant admission." *Doe* v. *Pringle, supra.* Judge Harold H. Greene in the *Hickey* case expressly found:

> "However the contentions on the instant motion may be couched, what plaintiff seeks in this case is a review of defendants' denial of his application for admission to the District of Columbia bar examination. The constitutional challenge to that denial is wholly and directly intertwined with plaintiff's efforts to secure an exemption from Rule 46, and the allegations of the complaint and the relief requested concern essentially the application of the Rule to his own particular case. In view of that circumstance, there is no basis for the extraordinary attempt to invoke the jurisdiction of this Court on a matter entrusted by the Congress to the D.C. Court of Appeals." (J.A. 143a.)

And Judge June Green reached the same conclusion in the *Feldman* case:

> "If this Court were to assume jurisdiction over the subject matter of this lawsuit, it would find itself in the unsupportable position of reviewing an order of a jurisdiction's highest court. Congress explicitly denied such a position to this Court when it enacted the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (1970) and exclusively empowered the D.C. Court of Appeals with authority to prescribe rules for admission to the D.C. bar." (J.A. 82a-83a.)

Accordingly, even under the distinction described in *Doe,* respondents cannot prevail. Stripped of verbiage, their federal court cases were not challenges to the D.C. Court of Appeals' "general rules and regulations" in an original action in the District Court but, quite the contrary, were actions for review

of allegedly "arbitrary and capricious" decisions by the D.C. Court of Appeals in their particular cases.[4]

B. ***The Summers Doctrine***

Respondents acknowledge that this Court's decision in *In re Summers,* 325 U.S. 561 (1945), is of critical relevance in this case, and they labor at considerable length to distinguish their cases from *Summers.* (*See* Feldman Brief at 27-35; Hickey Brief at 14-18.)

In *Summers,* this Court held:

> "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court." *In re Summers,* 325 U.S. 561, 568-69 (1945).

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4 Not only do respondents fail to satisfy the test of *Doe* but their position, if upheld, would effectively eviscerate the doctrine of that case. According to respondents, a federal court plaintiff may ignore the allegations of his complaint and the factual gravamen of his case and may avoid the *Doe* prohibition on review of individual state court decisions by a simple expedient, namely, including a statement in his brief that he is "challenging the constitutionality of the general rules and regulations" governing admission to the bar. (Hickey Brief at 11; *see* Feldman Brief at 41.)

Moreover, it appears that respondents do not even view such lip service to the *Doe* doctrine as necessary. They also claim that the decision of the highest court of a state on an individual application can be reviewed in a lower federal court if the plaintiff alleges that the decision itself was arbitrary or capricious or constituted an "act of discrimination." (Feldman Brief 33 n.42; *see* Hickey Brief at 12, 25.) Thus, if respondents' arguments were accepted, obtaining review in a lower federal court of a prior adverse state court decision in an individual case would only be a matter of proper pleading, and the *Doe* doctrine would lose all substantive force.

Over the years this doctrine has been followed and applied both by this Court and by lower federal courts. (*See* cases cited in Brief for Petitioners at 20-22.)

Mr. Feldman now claims:

> "The D.C. Court of Appeals' denial of respondent's petition was simply not a 'judicial' determination within the meaning of *Summers*. . . . Unlike *Summers*, Mr. Feldman did not assert a 'claim of a present right to admission' to the District of Columbia Bar." (Feldman Brief at 11, 29.)

But, even though his brief runs for almost 50 pages, it apprises the Court only selectively of what Mr. Feldman's counsel said in the proceedings before the D.C. Court of Appeals, and it omits entirely to mention how he described those proceedings in his District Court complaint.

Mr. Feldman's counsel told the D.C. Court of Appeals:

> "It would be contrary to the principles adopted in [*Berger* v. *Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975)] for this Court to refuse to consider Mr. Feldman's application for bar admission solely because he lacks a degree from an A.B.A. accredited law school. Rather, *this Court must give him some opportunity to show that his unique training and experience have provided him with adequate qualifications to practice law.* A flat rejection of Mr. Feldman's application without according him that opportunity would represent the very kind of irrebuttable presumption that the Supreme Court and United States Court of Appeals have expressly condemned."
>
> * * *
>
> "Scrutinized under the test applied in these cases, it is clear that *a bar admissions procedure that requires graduation from an A.B.A. accredited law school cannot stand.* By denying worthy candidates like Mr. Feldman an op-

> portunity to show that their individual qualifications are the equivalent of formal law school education, such a requirement is neither 'reasonably related' to the purposes of regulating the practice of law nor 'no more extensive than necessary'." (J.A. 11a, 13a.) (Emphasis supplied.)

And later, in his federal court complaint, he told the District Court that, in the proceedings before the D.C. Court of Appeals, he had:

> "argued that, on its face and as applied, Rule 46 violated both the United States Constitution and the federal anti-trust laws insofar as it conclusively denied admission to the bar to all persons except graduates of an ABA accredited law school." (Complaint ¶ 24; J.A. 41a.)[5]

Respondent Feldman now purports to distinguish *Summers* on the ground that "Summers had argued in the Illinois Supreme Court that it would be unconstitutional to exclude him from the bar and, thus, had asserted '[a] present right to admission to the bar.' " (Feldman Brief at 10.) But, by his own statement, this is the very thing that Mr. Feldman's counsel argued in the D.C. Court of Appeals: that it would be unconstitutional to exclude Mr. Feldman from the D.C. Bar.[6]

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5 It is a striking omission for respondent Feldman not even to mention his own acknowledgement below as to the questions he had raised in the D.C. Court of Appeals. In the light of that acknowledgement, we continue to wonder how he can repeatedly assert here that his constitutional claims were "neither argued nor decided" in the D.C. Court of Appeals. (Feldman Brief at 11; *see also id.* at 4, 12, 38.)

Moreover, his contention here (*id.* at 4-5) that he was merely warning the D.C. Court of Appeals of what action he would take if his petition were denied is belied by his extensive presentation of the issues in his counsel's lengthy letter to the D.C. Court of Appeals. (J.A. 6a-14a.) The submission of his claims was neither advisory nor hypothetical. Counsel unmistakably asserted that respondent had a right to have the Court Rule declared or treated as invalid and inapplicable in his case.

6 Mr. Feldman's alternative position (and the position of Mr. Hickey) was that he was qualified for admission to the D.C. Bar examination.

The District Court in *Feldman*, not surprisingly, took counsel at his word and found that he had presented "a claim of a present right" to the D.C. Court of Appeals. The Court said: plaintiff "in fact raised constitutional and statutory issues before the D.C. Court of Appeals. In a lengthy letter submitted by counsel, plaintiff challenged the validity of Rule 46 on its face and as applied, alleging violations of due process, equal protection and antitrust law." (J.A. 82a.) The present *ex post facto* attempt to rewrite the history of the *Feldman* case to avoid the *Summers* doctrine cannot prevail.[7]

Nor should respondent Hickey be better off on the jurisdictional issue merely because his counsel did less than Mr. Feldman's counsel in the proceedings before the local court. Mr. Hickey attempted, in effect, to split his case for bar admission—litigating some aspects of it in the D.C. Court of

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This provoked Circuit Judge Robb, dissenting below, to comment:

> "I can see no difference in principle, so far as review in the Supreme Court is concerned, between denial of a claim of present right to admission to the bar, on the one hand, and denial of a claim that the appellants are presently qualified to take the bar examination." 661 F.2d at 1321-22.

7 Mr. Feldman's invocation of the so-called "abstention" cases as sanctioning his purported reservation of the right to pursue federal Constitutional questions in the District Court is also wholly misplaced. (*See* Feldman Brief at 19, 35, 47.) It is elementary that the issue of abstention does not even arise unless the District Court has valid subject matter jurisdiction, *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976); the cases dealing with reservation of federal claims involve situations in which the plaintiff sues first in the federal District Court, the District Court indisputably has subject matter jurisdiction, and the plaintiff is remitted to a state court under the "abstention" doctrine to bring a subsequent proceeding for the determination of state law questions. *See England* v. *State Board of Medical Examiners*, 375 U.S. 411 (1964). The present cases raise the issue whether the District Court had subject matter jurisdiction at all; here, unlike the cases relied on by respondents, the first proceedings initiated by respondents were in the local court, and only after respondents lost there did they attempt to bring suit in the federal District Court.

Appeals while holding back other elements in hopes of having a "second bite" in the subsequent District Court proceedings. Judge Harold H. Greene correctly concluded that this bypassing tactic did not confer jurisdiction on the District Court. Judge Greene said:

> "It is also clear that, had plaintiff raised the issues concerning the validity of rule 46 before the D.C. Court of Appeals in the context of the proceeding he brought there, that court could and would have entertained and determined them. *Harper* v. *District of Columbia Committee on Admissions*, 375 A.2d 25 (D.C. 1977). Had that course been followed, this Court would have been precluded in any event from thereafter entertaining those same issues. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977)." (J.A. 143a-144a.)

Having chosen to go to the D.C. Court of Appeals for individualized relief in the first instance, Mr. Hickey could not save his case for subsequent District Court jurisdiction by presenting only a part of it to the local court.[8]

The essence of both respondents' efforts to distinguish *In re Summers* is their claim that the D.C. Court of Appeals decisions in their cases were only ministerial or administrative, and were not judicial in character. (*See* Feldman Brief at 20-35; Hickey Brief at 13-18.) Respondents recognize that *Summers* is to the contrary, and they concede that this Court has expressly

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8 Although it is unnecessary to reach the question of *res judicata* in either case, we point out that it is an independent basis for affirming the dismissals by the District Court. *See Helvering* v. *Gowran*, 302 U.S. 238 (1937). Neither respondent sought review here of the Order of the D.C. Court of Appeals in his case in the manner prescribed by law, but both let the judgments become final. Final orders of the District of Columbia courts are "conclusive of all claims made and every ground which might have been urged in their support." *Calvin* v. *Calvin*, 214 F.2d 226, 228 (D.C. Cir. 1954). The basic principle that *res judicata* bars relitigation of all issues that could have been raised, even if they were not raised, is well settled. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876).

held that admission of attorneys to the bar "is the exercise of judicial power, and has been so held in numerous cases." *Ex parte Garland*, 71 U.S. 333, 378-79 (1866). But they argue that petitioners' reliance on such precedents is "simplistic" and that "close examination" and "careful analysis" are necessary to understand the real meaning of the decisions respecting the judicial character of bar admissions decisions. (Hickey Brief at 13, 17; Feldman Brief at 25, 28.)

Respondents' analysis, however, is far more remote from the relevant precedents than it is close or careful. Respondents discuss at length and rely heavily on cases having nothing to do with bar admissions matters, such as *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210 (1908) (railroad ratemaking); *Public Service Co.* v. *Corboy*, 250 U.S. 153 (1919) (drainage project supervision); and *Roudebush* v. *Hartke*, 405 U.S. 15 (1972) (election recount proceeding).[9]

Moreover, although *Summers* itself stressed that the substance of a proceeding and not its form determines its character, respondents nonetheless go to great lengths to try to demonstrate that the *form* of the proceedings before the D.C. Court of Appeals was not judicial. (*See* Feldman Brief at 11, 21, 30-32; Hickey Brief at 17.). To the extent that respondents' arguments based on form are relevant, however, the present

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9 *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), involved a Court rule relating to advertising by lawyers. It was an original action in the federal District Court challenging the facial validity of a disciplinary rule of general applicability; unlike the situation in the present cases, there was no prior state court decision in an individual case of which review was being sought in the lower federal courts. *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), came to this Court on direct review of a decision of the highest state court, a course respondents elected not to pursue.

Respondents' reliance on *Rose* v. *Mitchell*, 443 U.S. 545, 561 (1979), a case involving alleged racial discrimination in the selection of a grand jury foreman, is utterly mysterious. It was stated in *Rose* that: "The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question." 443 U.S. at 563. No such claim is made here, nor can it seriously be contended that the D.C. Court of Appeals will not fully and fairly hear the claims of bar applicants. (*See* Brief for Petitioners at 25-26.)

cases are even stronger than *Summers* for finding a judicial proceeding. In *Summers*, the Illinois Supreme Court took the position that the proceedings were not judicial in nature and no case or controversy existed. (325 U.S. at 564-65.) Nevertheless, this Court held that the denial of the petition for admission to the bar was reviewable. In the present cases, the D.C. Court of Appeals took the position that its Orders denying respondents' petitions were judicial determinations. In *Summers* the denial of the petition was informal, consisting of letters signed by the Chief Justice of the Illinois Supreme Court. (*Id.* at 564.) In the present case, the judicial acts of the D.C. Court of Appeals were embodied in formal Orders in the name of all members of the Court. (J.A. 18a; 49a.)[10]

III. Federal District Court Jurisdiction Over Respondents' Cases Cannot Be Reconciled with Principles of Comity and Federalism

As we noted at the outset, respondents have claimed that the decision below is consistent with principles of comity and

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10 The fact that the Illinois Committee on Character and Fitness was named as a party in *Summers*, whereas no adverse party was named by Mr. Feldman in his petition (Feldman Brief at 31), is of no consequence. The Committee was a nominal party in *Summers*; no process was served on it and no appearance was made on its behalf. (325 U.S at 567.) This Court said: ". . . we think the consideration of the petition by the [State] Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceedings adversary in the sense of a true case or controversy." (325 U.S. at 567-68.)

Respondent Feldman's argument that neither he nor the D.C. Court of Appeals followed "established procedures for filing and prosecuting appeals" (Feldman Brief at 30) is likewise beside the point. The proceeding in the D.C. Court of Appeals was not an appeal from a decision of the Superior Court of the District of Columbia or an administrative agency of the D.C. Government, but an original proceeding initiated by Mr. Feldman through the filing of his petition in the D.C. Court of Appeals. And, contrary to his contention (*id.* at 33; *see also* Hickey Brief at 17), he made an extensive record in the D.C. Court of Appeals, including his petition and exhibits and his counsel's factual and legal submission on his behalf, and was not precluded from presenting any material he or his counsel deemed relevant.

federalism. It is not. The jurisdiction which the decision confers on the federal District Court in the District of Columbia is both inappropriate and intrusive and, if upheld, would embroil the District Court deeply in matters of purely local concern (including matters of legal education and educational policy).

Perhaps the most graphic evidence of the actual character of the litigation initiated by respondents in the District Court is the discovery program they undertook against the D.C. Court of Appeals. Although Mr. Feldman now claims that his discovery requests to the local court were "narrowly focussed" (Feldman Brief at 6), they were not. In fact, his interrogatories and requests for production of documents reflected a sweeping effort to involve the federal court in the decisional processes of the D.C. Court of Appeals in his particular case and in the discharge of its statutory responsibilities with respect to admission to the D.C. Bar. The following are only a few of the questions which Mr. Feldman called upon the Judges of the D.C. Court of Appeals to answer:

— "Identify all documents which refer to, relate to, concern or reflect plaintiff's application for admission to the District of Columbia Bar, his petition for a waiver of Rule 46, his legal training, or his qualifications to practice law."

— "Have you, or anyone acting on your behalf or under your supervision, made an independent examination of the quality of legal education provided at law schools approved by the American Bar Association? If such an examination was conducted, identify the date or dates when it occurred, the individuals who participated in it, and the conclusions in which it resulted. Identify any documents which refer to, relate to, reflect or concern such examination or the conclusions in which they resulted."

— "Identify all documents which refer to, relate to, concern or reflect the subject-matter areas that, in defendants' view, should be tested on the District of Columbia bar examination."

— "Identify all persons who are now, or were formerly, members of the District of Columbia Bar and, at the time of their admission, had not graduated from a law school approved by the American Bar Association (A.B.A.). For each such person, provide the following information:

* * *

"(e) A detailed description of the considerations on which the person's admission was based, including but not limited to whether the provisions of Rule 46 I of the Court of Appeals Rules requiring graduation from an A.B.A. approved law school were waived and, if so, for what reasons." (J.A. 50a-57a.)[11]

And Mr. Hickey's discovery program—which also included an ambitious schedule of depositions—was, if anything, more sweeping. As to the prior denial of his petition, he demanded that the local judges provide, *inter alia:*

"(a) a detailed description of the considerations on which this denial was based;

"(b) the identity of every communication relating in any way, either directly or indirectly to Plaintiff's Special Petition;

"(c) the date or dates upon which this matter was discussed;

* * *

"(e) the identity of all those who participated in each discussion and the position taken by each participant in each discussion;

* * *

"(h) the identity of all those who submitted reports on the matter, or who communicated with you in any way,

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11 Production of all documents identified in response to the interrogatories was also requested. (J.A. 58a-59a.)

> either directly or indirectly, with respect to the matter." (J.A. 88a-89a.)

As to the D.C. Court of Appeals' prior decision not to grant a waiver of the Court's Rules for graduates of Mr. Hickey's law school, Potomac, he demanded:

> "With regard to your denial on November 12, 1977 of Potomac School of Law's Petition for a Temporary Waiver of Rule 46 I(b)(3), provide the following information:
>
> "(a) a detailed description of the considerations on which this denial was based, and
>
> "(b) the identity of each communication relating in any way, either directly or indirectly to the Petition." (J.A. 86a.)

And as to the 24 credit hour requirement of Rule 46I(b)(4) (which was implicated in the individual circumstances of Mr. Hickey's case),[12] he demanded:

> "Describe in detail all efforts made by you, or anyone acting on your behalf or under your supervision, to ascertain what the policy of the ABA is toward the admission of non-degree candidates to accredited schools for 24 credit hours for the purpose of complying with Rule 46 I(b)(4)."
>
> "Describe in detail all efforts made by you, or anyone acting on your behalf or under your supervision, to ascertain what the policy of the accredited law schools in

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12 Rule 46I(b)(4), entitled "Law Study in a Law School NOT approved by the ABA," provides:

> "An applicant who graduated from a law school not approved by the American Bar Association may be permitted admission to an examination only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval."

> the District of Columbia is toward the admission of non-degree candidates for 24 credit hours for the purpose of complying with Rule 46 I(b)(4)." (J.A. 89a-90a.)

Mr. Hickey's counsel planned to supplement his interrogatories by a similarly wide-ranging program of depositions. He noticed the depositions of various local law school deans (*see* J.A. 116a-127a) in an effort to show that he could not obtain admission to an approved law school for 24 credit hours, and that the D.C. Court of Appeals was wrong in its order suggesting that he could (J.A. 49a)—a further confirmation that he was attacking the Court's prior decision in his individual case. He noticed as well the deposition of the then-Clerk of the D.C. Court of Appeals, Alexander Stevas (J.A. 128a), an effort which was thwarted only because Judge Harold H. Greene dismissed the *Hickey* complaint.[13]

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13 Mr. Hickey dwells in his brief on documents allegedly showing "*ex parte*" communications between the D.C. Court of Appeals and the ABA, which he claims are proof that the Court was not exercising a judicial function in deciding his case. (Hickey Brief at 17.) The facts are, however, that the ABA was not even a party to his case and that the only such document relating to his case was a letter from Mr. Stevas to the Staff Director of the Section of Legal Education and Admission to the Bar of the ABA, dated April 26, 1978. (J.A. 138a-139a.) This letter was written at the Court's request to ascertain the truth of the allegation in Mr. Hickey's petition that "the ABA has instructed, as a matter of policy, the approved law schools in the District of Columbia to deny admission to nondegree candidates, as Potomac graduates will be, for completion of the 24 credit hour requirement." (J.A. 24a.) The ABA's representative replied that there was no such instruction and that Mr. Hickey would be eligible for admission for the 24 credit hours under ABA standards, although the ABA standards did not require a law school to accept any candidate and there were legitimate reasons why a school might decide to limit its enrollment. (J.A. 140a-141a.)

Suffice it to say that even the panel majority in the U.S. Court of Appeals recognized that the alleged "*ex parte*" contact was scarcely determinative of the question whether the decision of the D.C. Court of Appeals in Mr. Hickey's case was judicial or not. The distinction between ministerial and judicial action does not turn on the existence

The discovery programs attempted in the District Court confirmed that the *Feldman* and *Hickey* actions were tantamount to proceedings for review of the prior D.C. Court of Appeals' decisions in their individual cases, and also highlighted the extraordinarily intrusive nature of the jurisdiction sought to be imposed on the federal court. As we set forth in our opening brief, the District of Columbia Court Reorganization Act represents a clear and unambiguous decision by Congress that the D.C. Court of Appeals—and not the federal District Court or the D.C. Circuit—is to "make such rules as it deems proper respecting examination, qualification, and admission of persons" to the D.C. Bar. 11 D.C. Code § 2501(a).[14]

The *Feldman* and *Hickey* cases, however, would not only involve the federal District Court in the local bar admissions process but would do so in the most disruptive way possible: by allowing the District Court to review individual bar admission decisions of the D.C. Court of Appeals. This Court has never before sanctioned the exercise of such jurisdiction by a lower federal court, and it should not do so now.

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or absence of alleged "*ex parte*" contacts but rather, as the panel majority acknowledged, on "the crucial question . . . whether the final act was judicial in nature." 661 F.2d at 1314 n.166.

14 It will be noted that when Mr. Feldman's counsel made his submission to the D.C. Court of Appeals, he conceded that Court's "plenary" power to regulate the licensing of attorneys in the District. (J.A. 9a). That word, however, drops out of his brief here. He repeatedly asserts here that he merely asked the D.C. Court of Appeals to exercise its "administrative" powers on his behalf (Feldman Brief at 4, 11, 29-30). One will search his submissions in the D.C. Court of Appeals in vain for that word. The point is not that labels should govern, but rather the contrary: the effect of the decision below is to make an inroad of substance on the jurisdiction confided by Congress to the D.C. Court of Appeals, and no sleight of hand can obscure that fact.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed insofar as it held that the District Court had jurisdiction to consider the merits of respondents' complaints, and the complaints should be dismissed as ordered by the District Judge in each case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rules 28.5 and 35.7 of the Rules of the United States Supreme Court, I hereby certify that three copies of the foregoing Reply Brief for Petitioners were sent by first-class mail, postage prepaid, to each of the following counsel on this 30th day of November, 1982:

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Amicus Brief

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
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v.

MARC FELDMAN and EDWARD J. HICKEY, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES

The Conference of Chief Justices moves for leave to file the attached brief *amicus curiae* urging reversal of the decision below in this case.*

1. The Conference of Chief Justices is an organization composed of the highest judicial officers of each State of the United States, the District of Columbia, Puerto Rico, and each U.S. territory. Founded more than thirty years ago and currently affiliated with the National Cen-

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* *Amicus* has attempted to obtain the written consent of all parties to the filing of the attached brief. Although petitioners have consented, both respondents have refused such permission. *Amicus* has accordingly filed this motion pursuant to Supreme Court Rule 36.3.

ter for State Courts, the Conference is concerned with the administration of justice in the state court systems over which its members preside and with the relationship of those systems to the federal judiciary.

2. The Conference fully supports the maintenance of federal court jurisdiction in all appropriate cases, as evidenced by its recent unanimously passed resolution opposing legislation to restrict the jurisdiction of the federal courts. The Conference has also consistently taken the position, however, that federal lower court review of the decisions of state supreme courts contradicts important principles of federalism and jeopardizes the integrity of the state court structure. By holding that a federal district court may review the decision of the highest court of an independent jurisdiction concerning admissions to the bar of that court, the decision below threatens these fundamental principles, which are matters of vital concern to *amicus* Conference of Chief Justices.

3. *Amicus* is particularly concerned because the decision below grants to lower federal courts the authority to review state court decisions concerning admissions to the bar of their own states, an area which has traditionally been the exclusive province of the highest court of each jurisdiction. Unless reversed by this Court, the decision below would permit federal courts across the country to intervene in state court regulation of the qualifications, standards of professional conduct, and discipline of the members of its bar.

4. *Amicus* submits that its participation will provide an additional perspective that may prove valuable to the Court in this case. This Court permitted *amicus* Conference of Chief Justices to file a brief in support of the petition for a writ of certiorari in this case; *amicus* now seeks simply to present those same views to this Court as it considers the merits. In addition, the granting of this motion will not cause any harm or prejudice to any other party or amicus. The Conference of Chief Justices' mo-

tion for leave to file an *amicus curiae* brief in this case should accordingly be granted.

Respectfully submitted,

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---

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

As set forth in more detail in the motion for leave to file this brief, *amicus* Conference of Chief Justices is an organization composed of the highest judicial officers of each State of the United States, the District of Columbia, Puerto Rico, and each U.S. territory. The Conference of Chief Justices has a vital interest in the issues of *de novo* review of state court decisions by lower federal courts and the authority of each state court over admissions to its own bar, which are the subjects of the holding of the court below.

The impact of the decision below is not limited to the District of Columbia. Unless reversed by this Court, the decision would permit lower federal courts in each of the

fifty states to intervene in and review state court decisions concerning the admission, regulation, and discipline of attorneys. *Amicus* therefore joins petitioners in urging reversal of the decision below.

ARGUMENT

The court below reversed two separate decisions of the United States District Court for the District of Columbia concerning the same subject: the jurisdiction of the federal district courts to review decisions of the highest court of another jurisdiction in bar admissions matters. Both cases involved individual complaints that the District of Columbia Court of Appeals had refused to waive its regular bar admissions rules on the applicants' behalf. Neither applicant sought review in this Court of the decision of the District of Columbia Court of Appeals.[1] Yet the court below, in a split decision, held that the district court had jurisdiction to hear the applicants' claims against the judges of the District of Columbia Court of Appeals and the court's admissions committee.

If applied in other jurisdictions, the decision below would eradicate the basic principle recognized by this Court that "[s]ince the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the states and the District of Columbia within their respective jurisdictions." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979). Just as authority over admissions to the federal bar is controlled by the federal courts, including this Court, so do the courts in each sovereign state have "autonomous control" over the regulation of the practice of law within their jurisdiction, subject to review

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[1] Under 11 D.C. Code § 102 and 28 U.S.C. § 1257, the decisions of the District of Columbia Court of Appeals may be reviewed by this Court. As this Court has previously recognized, the District of Columbia Court of Appeals is the highest court in its jurisdiction and has the status of a state supreme court. Key v. Doyle, 434 U.S. 59, 64 (1977).

of constitutional questions by this Court. *Theard* v. *United States*, 354 U.S. 278, 281 (1957).

The principle that each court retains control over admissions to its own bar is important because a court is not "merely acting as a state [or federal] licensing agency" in making admissions decisions. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122, 125 (7th Cir. 1977). Instead, as this Court has explicitly held, the admission or exclusion of attorneys involves "the exercise of judicial power" by the courts. *Ex Parte Garland*, 71 U.S. 333, 378-79 (1866). *Accord, e.g., In re Summers*, 325 U.S. 561, 568-69 (1945). To entertain an action challenging such a decision is thus to exercise appellate review over a state court judgment.

"Irrespective of how [a litigant] labels his lawsuit," therefore, a federal court action such as those at issue here is "tantamount to an appeal or a petition to review the state court order." *Jones* v. *Hulse*, 391 F.2d 198, 202 (8th Cir.), *cert. denied*, 393 U.S. 889 (1968). By holding that a federal district court has the power to conduct such proceedings, the court below has erroneously instructed the district court to disregard fundamental principles of comity and federalism, as well as jurisdictional limitations on the district courts, which preclude such review of state court judgments. As this court has long held, "no court of the United States other than this Court could entertain a proceeding to reverse or modify" a state court judgment, since "[t]o do so would be an exercise of appellate jurisdiction" beyond the power of the district courts. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

In addition to the important principles at stake in this case, the decision below would have far-reaching practical consequences unless it is reversed. The same analysis which led the court below to empower federal district courts to review state court bar admissions decisions could also apply to numerous other areas of state court

decision-making, such as attorney discipline, promulgation of ethical standards, regulation of the unauthorized practice of law, and judicial discipline. Even the establishment by state supreme courts of procedural rules could conceivably be considered "non-judicial" and subject to review by inferior federal courts. Under the rationale of the decision below, each individual lawyer or disappointed bar applicant dissatisfied with an admissions decision, a disciplinary sanction, or even a state court procedural rule could conceivably seek *de novo* review on any arguable constitutional ground in a federal district court. Inconsistent interpretations of state rules and their constitutionality could proliferate, even within a single state. Federal and state courts in the same jurisdiction would inevitably conflict with each other concerning admissions and disciplinary standards, or even concerning the application of such rules to individual cases.

Indeed, *de novo* review by federal district courts of state bar admissions and similar decisions would cause serious disruption of the state court system. As illustrated by this very case, federal district court litigation concerning state court admissions decisions may embroil state supreme court judges in extensive discovery proceedings as litigants seek to probe the judges' decision-making processes. *See, e.g.*, Petition for Writ of Certiorari at 8 (referring to interrogatory propounded by respondent Hickey asking, *inter alia*, for "a detailed description of the considerations on which" the denial of his petition was based and "the identity of all those who participated" in deliberations related thereto). In future cases, litigants may even argue that state supreme court judges should be liable in damages for failure to admit them to the bar, arguing that such decisions are, as suggested by the court below, "purely nonjudicial rulings" to which the well-established doctrine of judicial immunity is inapplicable. *See* Appendix to Petition for Writ of Ce:-

tiorari at 49a n.199.[2] Such controversies would divert the time and attention of state supreme court judges and would interfere with the performance of their judicial functions, contrary to the decisions of this Court and to principles of comity and federalism. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967) (immunity of state court judges); *United States* v. *Morgan*, 313 U.S. 409 (1941) (limitations on discovery concerning adjudicative decision making).

It is precisely for these reasons that most of the federal appellate courts which have considered the question have held, in accordance with both district court judges in this case, that the federal district courts lack jurisdiction to review state court decisions concerning bar admissions and disciplinary matters. *E.g., Doe* v. *Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); *MacKay* v. *Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); *Jones* v. *Hulse*, *supra*.[3]

This does not mean, of course, that bar-related decisions of state courts cannot be reviewed where constitutional issues are at stake. Under 28 U.S.C. § 1257, this Court has often reviewed such decisions on a writ of certiorari, based upon the record in the state court,

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[2] Indeed, the court below itself suggested that the "doctrine of judicial immunity" would not apply to bar admissions decisions since, according to the court below, such decisions do not involve "judicial action." *Id.*

[3] Some federal courts of appeals appear to have reached a contrary result. *See* Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981); Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). *But see Grossgold, supra* (different Seventh Circuit panel reaching opposite result from *Ktsanes*). Both *Dasher* and *Ktsanes* appear to have assumed that review of the state court's decision in those cases was not available in this Court. *Dasher, supra*, 658 F.2d at 1051; *Ktsanes, supra*, 552 F.2d at 743. As discussed *infra*, however, this Court has frequently reviewed constitutional questions raised by state court bar admissions and discipline decisions.

thereby preserving the right of federal court review of important constitutional questions while helping to ensure uniformity of interpretation and to prevent unwarranted interference with state court systems. *E.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). The decision in this case should be reversed, however, in order to prevent indiscriminate intrusion into state bar matters by lower federal courts.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief of the Conference of Chief Justices as Amicus Curiae were sent by first-class mail, postage prepaid, this 13th day of September, 1982, to each of the following counsel for the parties:

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Docket Sheet

NO. 81-1335-CFX (Vide: 81-1526 81-1537)	TITLE District of Columbia Court of Appeals, et al., Petitioners v. Marc Feldman and Edward J. Hickey, Jr.

DOCKETED	COURT
Jan. 13, 1982	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Daniel A. Rezneck
	Counsel for Respondents: Michael F. Healy, Robert M. Sussman
Jan. 13, 1982	Petition for writ of certiorari filed. (Record filed).
Jan. 13, 1982	Appendix filed.
Feb. 16, 1982	Brief of respondent Marc Feldman in opposition filed.
Feb. 16, 1982	Brief of respondent Edward J. Hickey, Jr., in opposition filed.
Feb. 12, 1982	Motion of Conference of Chief Justices for leave to file a brief as amicus curiae filed.
Mar. 17, 1982	Reply brief for the petitioners filed.
Mar. 24, 1982	DISTRIBUTED. 4-16.
June 21, 1982	REDISTRIBUTED. SLBPAL 6-24.
June 28, 1982	The motion of Conference of Chief Justices for leave to file a brief as amicus curiae is GRANTED. Petition GRANTED.

July 2, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Sept. 13, 1982.
Sept. 10, 1982	Joint appendix filed.
Sept. 10, 1982	Brief for the petitioners filed.
Sept. 13, 1982	Motion of the Conference of Chief Justices for leave to file a brief as amicus curiae filed.
Oct. 4, 1982	The motion of Conference of Chief Justices for leave to file a brief as amicus curiae is GRANTED.
Oct. 7, 1982	Order extending time to file the respondents' brief on the merits until Oct. 21, 1982.
Oct. 22, 1982	Brief of respondent Marc Feldman filed.
Oct. 21, 1982	Brief of respondent Edward J. Hickey, Jr. filed.
Nov. 8, 1982	CIRCULATED.
Nov. 10, 1982	Motion of respondents for divided arguemtn filed.
Nov. 29, 1982	The motion of respondents for divided argument is GRANTED.
Nov. 30, 1982	Reply brief for the petitioners filed. (D).
Dec. 8, 1982	ARGUED.